REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 464 of 2003

PETER MUNYAO KAMWATHI.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED……1ST DEFENDANT

SAMROSS INVESTMENTS LIMITED.....2ND DEFENDANT

JOHN KIPKORIR SAMBU.....3RD DEFENDANT

RHODA CHESANGA SAMBU .....4TH DEFENDANT

JUDGEMENT

The plaintiff has sued the defendants seeking;

(1) An order that the charge in favour of 1st defendant over LR.NO.209/3011/1 Nairobi is void and of no effect.

(2) An order directing the 1st defendant to discharge the plaintiff's title No.LR.NO.209/3011/1 Nairobi and to deliver up to the plaintiff the documents of title in respect thereof.

(3) A declaration that the instrument of guarantee and indemnity given by the Plaintiff is null and void and the plaintiff is released and discharged therefrom.

(4) Reimbursement of Kshs.4,632,944/= from the defendants.

(5) An order of permanent injunction restraining the 1st defendant from selling, advertising or in any other manner dealing with the Plaintiff's property LR. NO.209/3011/1 Nairobi.

(6) Costs and interest.

It is clear by a letter dated 22nd March 1999 addressed to the principal debtor by the bank, the bank agreed to grant to the principal debtor a temporary overdraft facility of Kshs.10 million to be repaid in full on 30th April 1999. The facility was to be secured by a legal charge for Kshs.10 million over LR. NO.209/3011/1 Nairobi in the name of the plaintiff together with guarantees by the plaintiff and the 2nd defendant's director namely the 3rd and 4th defendants. The plaintiff did execute a legal charge over the suit property dated and registered on 22nd April 1999 as well as an undated instrument of guarantee. It is clear by 30th April 1999 formalities for the grant of the loan had not been completed and this necessitated

an extension of the offer period. It is alleged the extension was given on 6th May, 1999 following an application made on 30th April 1999 by the 2nd defendant.

It is also clear that on 30th April 1999 director of the principal debtor and the plaintiff called on bank at its Sarit Centre branch Nairobi with a view to drawing down the overdraft facility. In anticipation of a draw down the plaintiff issued two cheques on his business bank account maintained at Sarit Centre branch of the bank in the name of Gemwel East Africa Limited which was not paid. It is also alleged that the bank refused to make available the overdraft to the principal debtor on the basis that the facility had lapsed. And on 30th April 1999 the principal debtor addressed a letter to the bank requesting for extension for the facility up to 30th July 1999 when it would be repaid in full. By a letter dated 6th May 1999 addressed to the principal debtor bank agreed to extend the facility to 5th August 1999 when the facility would be repaid in full. It is also not contested that the overdraft facility was first drawn or used on 6th May 1999 according to the bank statements provided by the principal debtor to the bank. It is the case of the plaintiff that the extension outside 30th April 1999 constituted a breach of the term in which he offered the suit property and the guarantee as security. He claims that the conduct of the defendants was fraudulent and the same acts and omissions committed by the defendants entitled him to an order discharging both the land and the guarantee. The plaintiff further claims that the legal charge executed over the suit property before the 1st defendant's advocates is void abinitio. He claims that the 1st defendant took advantage of his illiteracy and failed to explain the charge instrument adequately before asking him to execute. As at January 2000 the 2nd defendant had defaulted in making payment in loan facility and a legal demand was issued followed by a statutory notice on 16th February 2000. The plaintiff claims that he was shocked beyond words to receive a demand letter from the 1st defendant's advocate claiming a sum of Kshs.10,927,925.15 as the amount due and owing. And that there was an imminent threat of sale of his property. He claims that the terms of the facility were varied by the bank at the request of the principal debtor on a number of occasions. He also contends that the facility was extended on a number of occasions where it was converted into a term loan by the bank without reference to him.

In a bid to sell his property the plaintiff made proposals and entered into agreements and thereafter made payments to the bank in the sum of Kshs.4,632,944/=. In essence it is the case of the plaintiff that he was not consulted either by the principal debtor or by the bank with regard to the request by the principal debtor for the extension of the overdraft facility after 30th April, 1999. He alleges that the 2nd and 3rd defendants were privy to the request of extension of the facility after 30th April 1999. The plaintiff says that when the bank refused to disburse the overdraft on 30th April 1999 he left it to the principal debtor and the 3rd defendant to secure the release of the title documents from the bank and all subsequent dealings with his property were done without his knowledge and/or consent. And that it was not until the bank began to commence the recovery proceedings against him in the year 2000 that he became aware that the bank had gone ahead to extend the facility to the principal debtor after 30th April 1999.

The simple issues for determination are;

(1) Whether the circumstances surrounding the execution of the charge by the plaintiff rendered the execution of the charge ineffective with the consequence that the charge instrument is null and void.

(2) Whether the charge (if valid) the extension of the overdraft facility beyond 30th April 1999 had the effect of discharging of the charge and the guarantee by the plaintiff.

(3) Whether the plaintiff is entitled to a refund of what he paid to the 1st defendant.

(4) Whether the 2nd and 3rd defendant fraudulently and without the plaintiff's knowledge and consent applied to the 1st defendant for an extension of the overdraft facility beyond 30th April 1999. On the same hand it is also important to understand and appreciate whether the extension of the overdraft facility beyond 30th April 1999 was done with full knowledge and consent of the plaintiff. On the same

breadth an issue for determination along that line is whether the bank acceptance to extend the facility beyond 30th April 1999 amounted to a new or substituted contract and/or variation of the contract. And whether the plaintiff was consequently discharged from any liabilities as a result of that extension on the legal charge, guarantee and indemnity.

From the evidence on record there is no doubt that on 30th April 1999 the 3rd defendant and the plaintiff went to the 1st defendant's Sarit Centre branch to draw down on the facility but they were informed that they could not because the facility had lapsed hence they could not access the funds that was to be given by the bank. It is clear that the overdraft facility to which the plaintiff agreed to secure by a legal charge guarantee was for a short term temporary facility repayable by 30th April 1999. That did not materialize thereby making a substratum on which the legal charge and guarantee were to be given to be rearranged by the bank in order to protect its interest.

Some of the conditions imposed by the bank for the grant of temporary overdraft facility to the principal debtor were that a legal charge for Kshs.10 million over L.R. No.209/3011/1 Nairobi and a guarantee for the same amount to be given to the bank by Peter Munyao Kamwathi, the plaintiff herein. The plaintiff did execute the legal charge over the suit property dated and registered on 22nd April, 1999, as well as an undated guarantee.

On 30th April, 1999, the 3rd defendant, a director of the principal debtor and the plaintiff called on the bank at its Sarit Centre Branch Nairobi with a view to drawing down on the overdraft facility. In anticipation, it is alleged that the plaintiff issued two cheques drawn by his business bank account in the name of Gemworld East Africa Limited, which unfortunately could not be honoured or paid. The reasons given was that the facility had lapsed and the bank could not disburse monies on the strength of an instrument, which had lapsed. On the same day, the principal debtor requested the bank to extend the facility to 30th July 1999, when it will be repaid.

By a letter dated 6th May 1999 the bank agreed to extend the facility up to 5th August 1999 when it should be repaid in full. From the evidence before court, the overdraft facility was first drawn on 6th May 1999 by the principal debtor. It is the case of the plaintiff that on 5th January 2000, he was shocked beyond words to receive a demand letter from the bank's Advocates claiming the sum of Kshs.10,927,965/15 and threatens of an immediate sale of his charged property. The plaintiff says that the terms of the facility were varied by the bank at the request of the principal on a number of occasions. That the facility was extended and converted into a term loan by the bank without reference to him. And in a bid to save his interest in the property, he made several proposals and entered into an agreement and made payments to the bank in the sum of Kshs.4,632,944/=. The plaintiff contends that sometimes in October 2002, he demanded a discharge of the suit property and claimed a refund of the amount paid to the bank.

It is the contention of the plaintiff that he was not consulted either by the principal debtor or by the bank or by the 3rd defendant with regard to the request by the principal debtor for the extension of the overdraft facility after 30th April 1999. On the other hand it is the position of the 2nd and 3rd defendants that the plaintiff was privy to the request for extension of the facility after 30th April 1999, he left it to procure the release of the title documents from the bank and all subsequent dealings with his property were done without his knowledge or consent. And it was not until the bank began to commence recovery proceedings against him in the year 2000 that he became aware that the bank had gone ahead to extend the facility to the principal debtor after 30th April 1999.

It is not in dispute that the 3rd defendant requested the plaintiff to offer his property, the suit premises to secure a temporary overdraft facility that the 2nd defendant was seeking from the bank. The facility was temporary and repayable in full to the bank on or before 30th April 1999. The plaintiff agreed to the request and gave out his title document to be charged for extension of the facility to the principal debtor. As a result a legal charge over the property was created. The charge is dated 22nd April 1999 and

registered on the same date. It is the case of the Bank that by 30th April 1999, the formalities for grant of the loan had not been completed and this necessitated an extension of the offer period. And that the extension was given on 6th May 1999, following an application made on 30th April 1999 by the 2nd defendant.

The plaintiff has now filed the present suit alleging that the charge over his property be declared null and void and that he be reimbursed the sums paid to the 1st defendant. The basis being that there was no valid extension of the loan facility on 30th April 1999 since the letter seeking extension was drawn by the 2nd and 3rd defendants without seeking his authority. No doubt that the plaintiff voluntarily and freely executed the charge, which is the central document in this dispute. He also signed a guarantee for the sum of Kshs.10 million. As the charge document provides the plaintiff as the mortgagor agreed to the bank lending/making advance to the principal debtor. Further under clause 1(a) of the guarantee given by the Plaintiff, it provides;

"*The sum or sums of money which are now or at any time shall be owing to the bank anywhere on any account what whatsoever whether from the customer solely or from the customer jointly with any other person."*

The effect and purport of the terms and conditions of the charge and guarantee executed by the Plaintiff is that he gave a continuing guarantee not restricted to 30th April 1999 or the date in the charge. As at 3rd April 1999, the bank had spent certain sums of money on the loan account so as to complete the offer it gave to the principal debtor. The questions to be determined is whether the circumstances surrounding the execution of the charge by the Plaintiff, about his poor schooling and education, rendered the execution of the charge ineffective. And secondly whether the extension had the effect of discharging the Plaintiff's obligation under the charge and guarantee. First and foremost the Plaintiff does not dispute signing the charge and guarantee document before an Advocate. He, however, alleges that he was not given an opportunity to seek an independent legal advise to appreciate and understand the effect and consequences of his signature. No doubt the charge document executed by the Plaintiff bears or is accompanied by a certificate, showing due compliance with section 69(4) (a) of the transfer of property Act.

The evidence by the 3rd defendant is that the documents were signed before Mr. Kibet Advocate who explained the nature and consequences of the execution carried out before him. In any case it is normal for persons seeking a facility from a bank to appear before an Advocate. And it was incumbent upon the Plaintiff to seek an independent legal advise. There is no evidence that he was denied the opportunity to take the charge and guarantee before his own Advocates. It is not the case of the Plaintiff that Mr. Kibet Advocate did not at all explain the effect and consequences of section 69 of the Transfer of the Property Act to him. From the nature of the communication exhibited before this court and observing the demenour of the Plaintiff, it is clear that he is not a man inhibited by lack of knowledge in English. He communicated very well in English and most of his evidence in court was in fluent English. In my observation, the Plaintiff is a shrewd businessman who can get what he wants from any institution. He was not handicapped as he tried this court to believe. In a letter dated 10th August 2000 the Plaintiff states as follows;

"*I Peter Munyao Kamwathi being a guarantor for the overdraft facility to Samross Investments Ltd, do hereby give a cheque of Kshs.750,000/= towards repayment of the overdraft facility.*

I promised the Bank to pay Kshs.1 million to stop the sale of my property and to make arrangement of how I will clear the facility with Samross Investment Ltd. I now pay Kshs.750,000/= and Kshs.250,000/= will be payable by 18/08/2000."

The above letter was preceded by an agreement between the plaintiff and the principal and the 3rd defendant admitting liability and apportioning the loan outstanding to the bank. In the agreement dated 15th July 2000, it is confirmed by the parties that the loan had remained unpaid since April 1999 and each party was given an obligation to repay the loan outstanding. The principal debtor and its two directors

agreed to repay a sum of Kshs.5,500,000/= while the plaintiff herein agreed to shoulder a sum of Kshs.4,500,000/=.

In a letter dated 15th September 2000, the Plaintiff informed the bank the ratio of repayment to be made between him and the principal debtor and its directors. The letter says in part;

"*It has been agreed between Mr. Peter M. Kamwathi of Gemworld East Africa Ltd and Hon. John Sambu of Samross Investments Ltd that each gives a proposal to repay their part of the loan. Out of the ten million loaned, Mr. Peter M. Kamwathi is to repay Kshs.4,500,000/= plus interest from the date that this proposal is accepted. Hon. John Sambu is to repay the rest of the money plus all the interest that has accumulated since the loan was released."*

In a letter dated 3rd November 2000, by Samross Investments Ltd addressed to the bank confirmed the agreement between the principal debtor and the plaintiff as to the mode of sharing the loan due and owing. The letter states;

"*I John Sambu of Samross Investments Ltd do hereby propose to repay the loan as follows:*

I propose to pay the loan balance in full plus all the interest in a period of five years. Due to the current economic crisis facing the country, I have also been caught up in the uncertain profit and loss business. I expect to pay the loan in 3 yrs but I request a five year repayment plan."

In a letter dated 9th November 2000, Samross Investments Ltd requested the bank to convert the overdraft into a term loan repayable in 5 years at the rate of Kshs.392,476 every month starting from January 2001. The offer was accepted but the plaintiff and the principal were unable to fulfill their promise and/or obligation. In a letter dated 29th May 2001, the plaintiff through his Advocates wrote to Mr. John K. Sambu of Samross Investments Ltd for purposes of splitting the amount owing to the bank between him and Samross Investments Ltd.

The plaintiff in this case contends that upon being informed by the bank that the loan amount could not be disbursed due to the lapse of offer on 30th April 1999 he trusted the 1st defendant to return his title documents and facilitate the process of discharging his property. He alleges that the 3rd defendant secretly and fraudulently made a fresh handwritten application to the bank on the same day using his security without informing him. The bank by its letter dated 6th May 1999 purported to extend the facility to 5th August 1999 without prior consultation with him and without informing or seeking consent from him. It was submitted on behalf of the plaintiff that the bank was required to consult with the plaintiff and obtain his consent before agreeing to accept the principal debtor's request for extension of the facility beyond 30th April 1999. And that the extension of the facility by the bank to the principal debtor beyond 30th April 1999 amounted to a new or substituted contract or alternatively a variation of contract all of which required the plaintiff's consent. No doubt the bank was under obligation to seek the plaintiff's consent if the contract had been substituted or if there was a variation of the contract without the knowledge of the plaintiff. The question is whether the bank committed a gross omission or whether it substituted or varied the terms of the contract without or behind the bank of the plaintiff. It is important to note that the promises made between the borrower and the chargor coupled with the execution of the charge and a guarantee constitutes a contract which is valid unless there is evidence to show the existence of vitiating factors that warrant the setting aside or disregarding of the said contract. Assuming that the 2nd defendant had proceeded contrary to the agreement with the plaintiff, it can be stated that the plaintiff had a choice or opportunity to rescind the contract immediately. In rescinding the contract after 30th April 1999 the plaintiff is required to show by way of evidence the steps he took in ensuring that the bank did not act on the offer and acceptance between the parties and that the charge and guarantee were no longer having a force of law. The law of contract requires that the election to rescind must involve an un-equivocal assertion by an innocent party that regards himself as no longer bound by the contract before the time for performance has expired. The law is also that the right of innocent party is lost if the innocent party affirms the contract knowing of the breach and his right to rescind. From the evidence on

record the applicant elected that the contract should continue notwithstanding the alleged breach by the other party and the fact that he did not repudiate or terminate the contract immediately is a clear indication that he had no objection or that he had benefited from the transaction between the principal debtor and the bank. The plaintiff therefore having benefited from the contract cannot now be allowed to repudiate the same after the necessary benefits has flowed from the terms and conditions of the contract. It is evident that the plaintiff knew of his legal rights and he was ably represented by M/S Mohamed and Kinyanjui Advocate from 2001 but still affirms the agreement by making the payment proposals and making actual payments to the bank. He also entered into negotiations with the persons who he alleges fraudulently used his property as security and even entered into an agreement to apportion the loan and repay in the proportion agreed between them. That conduct of signing an agreement and thereafter acting on the contents of that agreement is a clear indication that the plaintiff was all along aware that the bank had disbursed the money after 30th April 1999. It is not true as he says that he was shocked beyond words in January 2000 when he discovered the bank had put in process recovery proceedings against him for defaulting on the loan repayment schedule. I do not think a man would wait for almost 8 months in order to know whether his property had been discharged from the bank and whether the loan had been disbursed after the expiry of 30th April 1999. In my understanding there was a lapse of a reasonable time within which the plaintiff could have acted in order to salvage his property between the period of April 1999 and January 2000. The lapse of time between that period is a clear indication that the plaintiff had knowledge that the bank had acted on the disbursement of the loan and in the circumstances he is not an innocent party to rescind the contract. The plaintiff's conduct in this case was all along to affirm the contract in favour of the 1st defendant.

The plaintiff further alleges that by the extension of the facility the terms of the first grant were varied and therefore absolving him from any liability and rendering the charge registered inapplicable and ineffective in the subsequent contract. He states that the guarantee was up to 30th April 1999 and not any time thereafter and the fact the terms were varied without his knowledge exonerates him from any liabilities arising therefrom. In short the variation discharged the plaintiff as a surety and the bank should have required the plaintiff's consent or approval before granting the loan after 30th April 1999. From the evidence on record the plaintiff did not write to the bank informing them that he had rescinded the contract and requesting them to discharge his property and release his guarantee. On the contrary his actions shows that he affirmed the contract between him and the borrower was on. He accepted service of demand notices, make proposals to the bank to pay the charge debt and even to repay substantial part of it. In my mind therefore the plaintiff is estopped at this stage from claiming that he is an innocent party who is not liable to the bank under the charge and the guarantee. There is ample and un-controverted evidence showing that the plaintiff admitted owing the 1st defendant under the charge. In the letters which I reproduced hereinabove is a clear testimony that he made various promises to settle and which culminated in the repayment of the sum of Kshs.4.4 million. Of significant importance is the agreement dated 15th July 2000 by which the plaintiff and the 2nd defendant appear to have apportioned the indebtedness to the bank so that each would bear the responsibility of the agreed portion of his liability. In my opinion the totality of evidence tendered before this court gives the impression and indication that jointly the plaintiff and the 2nd, 3rd and 4th defendants are clearly indebted to the bank with respect to the loan of Kshs.10 million plus interest and other costs incurred by the bank. It is not true as stated by the plaintiff that in offering to help the 2nd, 3rd and 4th defendants to repay the loan he was not affirming his purported agreement with the 3rd defendant. The plaintiff contends that the effort he made in repaying the loan was the last ditch frantic effort to save his property from a looming sale. From the evidence tendered before this court that allegation is not supported by any cogent and credible evidence. I think estoppel is against the allegation and conduct of the plaintiff in that regard. The plaintiff was aware of his rights to elect the right path but he chose to ensure that he did not raise a finger between April 1999 and at the time when he purported sought an injunction before court in 2003. That is a considerable period of time and delay as in this case. The plaintiff as stated earlier pleaded and testified that he is a man of low level of education and that he was inhibited from appreciating the import of his actions in the way he conducted himself after 30th April 1999. The question is whether there is sufficient evidence to sustain those allegations. As was rightly pointed out by the advocate for the bank the plaintiff exhibited several letters which he wrote to the 1st defendant and which was in cogent English language. He also testified

that in his business at Gemworld East Africa Limited he dealt with many foreigners and his primary language of communication was English. He also testified that prior to this subject loan he had taken other loans with other banks, clearly shows that he was familiar with the procedures and consequences for taking a secured bank loan. In essence he was fully aware of the import and the resulting consequences of the charge which secured the loan to the principal debtor. By failing to take reasonable actions immediately after 30th April 1999 he by his conduct affirmed or acquiesced or permitted the dealings that was conducted by the bank and the principal debtor after the alleged expiry of the initial offer. It is therefore clear in mind that the plaintiff committed no mistake or error and there is no evidence that he was misled or misrepresented by the principal debtor subsequent to 30th April 1999. It is beyond doubt that the plaintiff was fully conscious of his actions and intentions. In my opinion the assertion currently raised is a mere afterthought intended to have a bite at the cherry when it is too late in the day. The conduct of the plaintiff and the totality of the various letters written to the bank is a clear indication that the plaintiff had prior knowledge of the events that resulted in the extension of the offer, the disbursement of the loan and the default by the principal debtor. There is sufficient evidence to show that the loan was disbursed and it was disbursed with knowledge of the plaintiff and from the evidence on record it is clear that he got a share from that loan which he now distances himself from its obligation and liability. I say to him that he is bound by his actions and conduct. He has a responsibility to ensure that the loan is repaid fully since that is what the charge and the guarantee demanded. There is no other route other than to ensure strict and due compliance with the obligations under the charge and guarantee. The primary obligation falls at the door step of the person who executed the charge and the guarantee. In my mind the plaintiff had sufficient and adequate knowledge of the effects and consequences of his signature. He cannot therefore be allowed to run away from his signature when there is an innocent party whose funds were taken away and used by the plaintiff and the principal debtor. The bank was not a party to the arrangements between the plaintiff and the principal debtor. And when there is a default and after parties had enjoyed the fruits of the loan the bank cannot in any way be faulted or accused for any omission or transgression. It is now the duty of the plaintiff and his erstwhile friend in the name of Mr. John Sambu and the principal debtor to ensure that the egg is returned to the nest. If the egg shall not be returned to the nest then the bank is entitled to ensure the security for the egg is taken away and sold immediately.

In conclusion I make a determination that the conduct of the plaintiff after 30th April 1999 reflects that he had full knowledge of the extension of the facility. There is also un-controverted evidence to show that the plaintiff was aware how and when the loan was disbursed. He made proposals together with the principal debtor which they could not honour. As stated therefore, he cannot run away from his primary obligation and duties as enshrined in the charge and guarantee he freely and voluntarily executed. In my determination the bank cannot be faulted for having put in process a mechanism to crystallize the suit property. The plaintiff was given adequate time to redeem his property but nevertheless he gave empty and unworkable proposals which he could not fulfill. The bank therefore has a right to sell the suit property since the plaintiff was given adequate opportunity to redeem his property but which he failed irredeemably. In that context the person at fault cannot be rewarded for equity frowns at the conduct of the plaintiff and his friends. In short I am satisfied;

(1) The charge made on 22nd April 1999 is valid and enforceable against the plaintiff.

(2) The guarantee by the plaintiff is valid, lawful and 1 enforceable against the relevant parties.

(3) The plaintiff is clearly and correctly indebted to the bank and he shall not be entitled to any reimbursement of any payments made to the bank. The basis being that the plaintiff's case lacks merit since it was not proved on the balance of probability. The plaintiff's case must fail and has failed in totality.

Lastly it is unfortunate that the plaintiff did not have any prayers against the 2nd, 3rd and 4th defendants who have actually benefited from the loan extended by the bank. The evidence on record shows that the 2nd, 3rd and 4th defendants got substantial part of the loan which resulted in the recovery proceedings commenced by the bank. There is an agreement dated 15th July 2000 by which the plaintiff and the 2nd defendant appear to have apportioned the indebtedness to the 1st defendant to the tune of Kshs.4.5 million

to be repaid by the plaintiff and Kshs.5.5 million to be repaid by the principal debtor and its two directors. It appears that agreement was not honoured by the principal debtor and its two directors. The question is whether a party can be allowed to benefit from his own illegality and omissions which would be detrimental to the rights of a third party. I am alive and aware that a party cannot be granted prayers which he did not plead in his pleadings. If the plaintiff had pleaded or made any prayers against the principal debtor and the two directors, I would have entered judgement against them in the sum of Kshs.5.5 million plus interest. That opportunity was not given to me by the plaintiff and I have no jurisdiction to grant orders which are not prayed for. In the circumstances it is unfortunate that the principal debtor and his two directors would escape any liability to be granted against them by this court.

In short I am unable to grant any prayers against the principal debtor and its two directors by virtue of the plaint and pleadings filed by the plaintiff. However, for their conduct I shall not grant them costs in this suit.

Order: The Plaintiff's suit is dismissed with costs to the 1st defendant only.

Dated, signed and delivered at Nairobi this 31st day of July 2009.

M. WARSAME

JUDGE