



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 53 OF 1997

KENYA COMMERCIAL BANK LTD PLAINTIFF

VERSUS

**BERNARD MWANGI NDERI T/A KIAMWATHI MEDICAL ENT. 1ST
DEFENDANT**

LEAH W. NDERI 2ND DEFENDANT

WINFRED N. NDERI 3RD DEFENDANT

WILFRED NDERI MWANGI 4TH DEFENDANT

CHRISTIAN M. NDERI 5TH DEFENDANT

MICHAEL W. NDERI 6TH DEFENDANT

RULING

On 25th March 1997, Kenya Commercial Bank Ltd, hereinafter referred to as “the Plaintiff” sued **Benard Mwangi Nderi T/A Kiamwathi Medical Enterprises, Leah W. Nderi, Winfred N. Nderi, Wilfred Nderi Mwangi, Christian M. Nderi and Michael W. Nderi**, hereinafter referred to as “**the 1st, 2nd, 3rd, 4th, 5th and 6th defendants**” respectively claiming a sum of Kshs.1,588,897/60 jointly and severally with interest thereon at the rate of 31.75% per annum from 1st August 1996 until payment in full. The suit was based on the individual guarantee executed by the defendants. Apparently the Plaintiff had advanced the sum of Kshs.300,000/= in 1992 and further Kshs.350,000/= in 1993 to Kiamwathi Medical enterprises and the defendants executed individual guarantee to indemnify the Plaintiff against any loss. The Plaintiff’s claim against the defendants jointly and severally was therefore for Kshs.1,588,897/60 being the outstanding amount on the loan due and owing from the defendants to the plaintiff inclusive of interest on account of the guarantees executed as aforesaid.

The defendants on being served reacted by filing a joint defence in which they stated that the sums advanced to the 1st defendant for which individual and joint guarantees were executed were repaid and

the plaintiff therefore had no valid claim against them.

Following the aforesaid defence, the plaintiff through **Messrs Mathenge & Muchemi Advocates** on 31st October 1997 filed an application pursuant to the provisions of Order VI rule 13(1)(a) of the civil procedure rules seeking that the defence filed herein be struck out and that judgment be entered for the plaintiff as prayed in the Plaint. That application was hotly canvassed before **Juma J** (as he then was) and by a ruling dated 8th November 1999, he dismissed the application with costs. In the ruling **Juma J.** delivered himself thus “..... **It is trite law that where a loan is secured by the charge the chargee cannot sue the charger (sic) for the loan until it has sold the charged property. The guarantor is not a principal debtor. The guarantor is only called upon when the lender has exhausted all the remedies available to him as against the principal debtor. In the instant case the bank can only sue the guarantors for the balance of the outstanding loan after it has exhausted its power of sale. The affidavit in support of the application does not state what action the bank has taken in realising the security before it filed suit**” It would appear therefore by this ruling, **Juma J** completely locked out the Plaintiff in so far as its pursuit of the claim against the defendants as guarantors was concerned. However the Plaintiff did not see the need to review and or set aside the said order. Nor did it deem it fit to appeal against it since its effect really was to determine a whole suit on an interlocutory application. The application before the court was for the striking out the defence and not the plaint. The Plaintiff despite the far reaching effects of the said ruling decided to sit on its laurels.

On 9th May 2008, the Defendants took out a Notice of Motion pursuant to orders XVI rule 5 and L rule 1 of the civil procedure seeking to have the suit dismissed for want of prosecution. The application was resisted and by ruling dated 15th October 2008 delivered by **Kasango J**, the application was dismissed with costs. Thereafter the suit was set down for hearing on 10th June 2009. On that day the suit was listed before me. At the very commencement of the hearing, **Mr. Wahome**, learned counsel for the Defendants indicated that he had a preliminary objection to raise with regard to the competence of the suit. He submitted that the 1st defendant died in January 2000. That the 2nd to 6th defendants were guarantors. That in a ruling delivered on 8th November 1999 **Juma J.** laid to rest the issue of whether the plaintiff could sue the guarantors. That issue cannot be re-opened by the Plaintiff pursuing the hearing of this case. Doing so this court shall be sitting on appeal against that ruling. He therefore urged me to strike out the suit with costs as there was nothing to be heard.

Mr. Wainaina, learned counsel for the Plaintiff in response stated that indeed the 1st defendant had been sued as a principal debtor and guarantor. He had however passed on. **Juma J** was right in his ruling. However, the remedies against the 1st defendant had been exhausted by his death. The next persons liable are now the guarantors. He further submitted that the plaintiff has been unable to realise the security. That section 74 of the Registered Land Act grants this court a discretion to stay the proceedings to give the lender time to realise the security for one more time.

I have now carefully considered the preliminary objection and the rival submissions made. There is no denying that the ruling by **Juma J** already reproduced elsewhere in this ruling laid to rest the issue of whether the plaintiff could sue the guarantors before exhausting its remedies against the principal debtor. Yes, the 1st defendant, the principle debtor may have passed on. However his death does not extinguish the Plaintiff’s remedies against him. The Plaintiff still retains the security of plot No. **Thegenge/Karia/814** offered by the deceased to secure the loan. The Plaintiff can still proceed against the estate of the deceased. The death of the 1st defendant cannot therefore amount to the Plaintiff exhausting all its remedies against the principle debtor.

Much as I have my own reservations regarding the ruling by **Juma J**, I cannot be seen to be departing from it as to do so will amount to sitting on appeal over the said ruling. I have indicated elsewhere in this ruling my areas concern over the ruling. **Juma J.** categorically stated that the chargee cannot sue the chargor for the loan until it has sold the charged property. Yet in this suit, the plaintiff sued the guarantors without having sold the charged property. **Juma J.** also found that the guarantor is only called upon when the lender has exhausted all the remedies available to him as against the principle debtor. He

also found that the Plaintiff could only sue the guarantors for the balance of the outstanding loan after it has exhausted its power of sale. In this case however, the plaintiff sued the guarantors without even first attempting to realise the security. Accordingly the guarantors are unaware of any balance outstanding on the loan. If I were to allow the hearing of this suit, I will essentially be re-opening the issue of the competence of the suit by the Plaintiff as against the guarantors which issue was effectively settled by **Juma J**. As I have already stated, that ruling was never reviewed nor appealed against though it is almost 10 years old. It would appear as correctly submitted by **Mr. Wahome**, that the suit against the guarantors ended on that day. It cannot be reopened by taking evidence.

Mr. Wainaina, agrees that **Juma J** was right in his holding. However he pleads that the remedies against the principal guarantor have been exhausted with his death. I have already dealt with this issue. He also seeks comfort in section 74 of the Registered Land Act which grants this court discretion to stay proceedings to give the lender a chance to exhaust the remedy of realising the security. In the light of categorical findings in the ruling, there will be no need to stay this suit to enable the Plaintiff exhaust its remedies against the estate of the principal debtor. Essentially what the ruling amounts to is that the suit is incompetent and remains as such and cannot be remedied by subsequent acts of the parties.

For all the foregoing reasons I uphold the preliminary objection raised by the defendants and accordingly strike out this suit with costs to the 2nd to 6th defendants.

Dated and delivered at Nyeri this 22nd day of July 2009

M. S. A. MAKHANDIA

JUDGE