



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CIVIL CASE 468 OF 2004

KEVIN AGGREY WAKOLI.....PLAINTIFF

VERSUS

HOUSING FINANCE.....DEFENDANT

JUDGMENT

The plaintiff is the registered owner of LR. No.Dagoretti/Riruta/3085 (*hereinafter referred to as the suit property*) situate within the City of Nairobi. The plaintiff desired to construct a residential house on the suit property. To achieve this objective, the plaintiff mobilized his own resources and was able to commence construction of a residential house on the suit property. According to the Bill of Quantities prepared by Quantconsult, a Quantity Surveying Firm, which was produced as an exhibit by the plaintiff, the estimated cost of constructing the residential house as at February 1994 was Kshs.7,717,931/=.

According to the plaintiff, he was able to apply the sum of approximately Kshs.1.5 million on the construction before he ran out of funds. The plaintiff made a decision to obtain a loan from the defendant to enable him continue with the construction of the residential house. According to the plaintiff, he made an application to the defendant to be advanced the sum of Kshs.1.5 million. The plaintiff made the application in August 1996 and on 4th September 1996, the defendant made an offer to advance to the plaintiff the lesser sum of Kshs.1 million. The plaintiff accepted the offer on 10th September 1996. Because the plaintiff had applied to be advanced the sum to enable him complete the construction of his residential house situate on the suit property, the defendant attached conditions in the manner in which the loan was to be disbursed.

The defendant prepared a schedule, which was approved by the plaintiff, upon which the loan amount would be disbursed. According to the schedule, the defendant would disburse the amount advanced depending on the achievement of certain stages of the construction of the house. The schedule presupposed that the plaintiff would secure funds from other sources to enable him complete the construction of the house. It should be noted that the amount advanced by the defendant to the plaintiff would not have been sufficient to enable the plaintiff complete the construction of the house. A fundamental term of the loan agreement (*clause 22 of the loan conditions*) was that the plaintiff was required to give an irrevocable authority to his bankers to deduct the agreed monthly installments in repayment thereof from his salary of Kshs.23,793/= for a period of seventeen (17) years until the loan was paid in full. In the event that the plaintiff did not obtain his salary through his bank, he was required to obtain an irrevocable authority from his employer to deduct the said monthly installments and have the same paid to the defendant during the period that the loan shall remain outstanding.

The plaintiff charged the suit property to the defendant to secure the said loan. The charge was duly registered. In accordance with the agreed schedule, the defendant disbursed two installments of

Kshs.500,000/= and Kshs.100,000/= respectively to the plaintiff. According to the defendant, the said disbursements were made on the understanding that the plaintiff would abide by the schedule that required him to complete certain stages of construction of the said residential house. According to the plaintiff, after the second disbursement was made on 24th February 1997, a disagreement arose between the plaintiff and the defendant in regard to how the plaintiff had expended the sums that had earlier been disbursed to him. Whereas the plaintiff contends that he had applied the entire amount disbursed to him to construct the residential house, the defendant was of the view that the plaintiff had diverted the money and failed to use it for the purpose for which it was advanced. To confirm its suspicion, the defendant instructed a valuer to visit the suit property to assess the works that had been undertaken by the plaintiff from the time the first two installments were disbursed. According to the valuer, the plaintiff had not applied the sum that was advanced by the defendant in accordance with the construction schedule that was agreed between the plaintiff and the defendant. The defendant declined to make further disbursements until the plaintiff fulfilled his part of the bargain by abiding by the terms of the loan contract that required him to undertake certain construction on the residential premises before further disbursement could be made.

Pursuant to this disagreement, correspondences were exchanged between the plaintiff and the defendant. According to the said correspondences (*which were produced in evidence by both the plaintiff and the defendant*), the decision of the defendant to stop further disbursements did not go well with the plaintiff. The plaintiff took the position that the defendant had deliberately refused to disburse the balance of Kshs.400,000/= with a view to frustrating him from completing the construction of his house. May be, because of his sense of grievance, the plaintiff refused to pay the monthly installments to the defendant as agreed when the loan was advanced, and further as contained in the instrument of charge. The disagreement between the plaintiff and the defendant was not resolved. Meanwhile, interest and other charges on the disbursed amount continued to accrue.

At one time in November 1997, the plaintiff proposed to the defendant to transfer his loan account to the mortgage scheme that had been agreed between the defendant and the University of Nairobi, the employer of the plaintiff. The salient feature of the said mortgage scheme was that the plaintiff would be entitled to be disbursed a sum of up to Kshs.1.5 million at a concessionary rate of interest. The University of Nairobi, by its letter dated 27th November 1997, wrote to the defendant proposing that the plaintiff be included in the said mortgage scheme entered between the University and the defendant. It was apparent that the defendant did not accept the said proposal by the University of Nairobi. When the defendant's witness, Joseph Kamau Kania testified in court, he stated that the defendant declined to favourably consider the plaintiff's application to be included in the concessionary mortgage scheme entered between the defendant and the University of Nairobi because of the problems that the defendant had experienced with the plaintiff.

The matter relating to the loan advanced to the plaintiff remained unresolved until 2001 when the plaintiff sought to engage with the Chief Executive of the defendant with a view to obtaining an outcome that was favourable to him. The plaintiff made allegations alleging several instances of impropriety on the part of the defendant's employees. For instance, in his letter dated 22nd January 2001, the plaintiff claimed that some members of staff of the defendant had either demanded to be bribed before they would prepare a favourable valuation report or had made decisions in bad faith with a view to obtaining the sale of the suit property to persons connected with them at a throwaway price. The plaintiff further made allegation against one Mr. Njuguna whom the plaintiff claimed had conspired to cause his death by contracting thugs. The plaintiff further notified the defendant that he had complained of the conduct of the defendant's employees to the then Head of Civil Service Dr. Richard Leakey, at the Office of the President. He claimed that he had been advised him to contact the Kenya Anti-corruption Authority with a view to securing the investigation and prosecution of the officers of the defendant who had purportedly engaged in corrupt and unjust practices. The defendant refused to be engaged with the plaintiff in regard to the complaints that he had raised.

On 25th April 2003, on without prejudice basis, the defendant proposed to the plaintiff to pay the sum of Kshs.2 million in full and final settlement of the amount owed. The plaintiff was required to accept the

offer by 8th of May 2003, failure of which the defendant notified the plaintiff that it would sell the charged property in exercise of its statutory power of sale, to recover the outstanding amount. The plaintiff did not take up the offer made by the defendant.

On 24th August 2004, the plaintiff filed the present suit. In his suit, the plaintiff contends that the defendant had acted in breach of the loan agreement that required that the defendant disburse the said sum of Kshs.1million to enable the plaintiff complete construction of his residential house. The plaintiff pleaded that due to the defendant's failure to disburse the final disbursement of Kshs.400,000/=, he had been unable to complete the construction of the residential house and thereby had suffered great loss and damage. The plaintiff pleaded that the defendant's refusal to favourably consider his application for his loan to be transferred to the concessionary mortgage scheme entered between the defendant and the plaintiff's employer, the University of Nairobi, occasioned the plaintiff further loss of benefit under the said scheme. The plaintiff therefore urged the court to award him damages for breach of contract which, in his view, should be computed in terms of the anticipated loss of rental income from July 1997 to date.

The defendant filed a defence denying that the plaintiff was entitled to be paid any damages. The defendant averred that it was indeed the plaintiff who had failed to abide by the terms of the loan agreement that required him to undertake certain steps in the construction of the residential house in accordance with the schedule before further disbursements could be made. The defendant stated that it was the plaintiff who was in breach of the terms of the loan agreement and therefore was not entitled to any damages. The defendant urged the court to dismiss the plaintiff's suit with costs.

After considering the evidence adduced and the closing submissions made, the issues for determination by this court are as follows:

- (i) What were the terms of the loan agreement between the plaintiff and the defendant?
- (ii) Was the loan that was advanced to the plaintiff under the terms contained in the letter of offer, conditions of loan and the instrument of charge or was it under the concessionary mortgage scheme entered between the defendant and the plaintiff's employer, the University of Nairobi?
- (iii) Who breached the terms of the loan agreement?
- (iv) What orders ought to issue on the basis of the pleadings and the evidence adduced in this case?

As regards issue (i), having evaluated the evidence adduced by the plaintiff and the defendant, I hold that the terms of the loan agreement between the plaintiff and the defendant were contained in the letter of offer dated 4th September 1996 which was signed by the plaintiff signifying his acceptance. According to the said letter of offer, the plaintiff agreed to abide by the defendant's standard loan conditions which were annexed to the letter of offer. In the letter of offer, the plaintiff agreed to charge the suit property to secure the said sum of Kshs.1 million that was to be advanced to him. The plaintiff further agreed to pay monthly installments of Kshs.23,793/= for a period of seventeen (17) years with effect from the date that the loan would be disbursed. The plaintiff further agreed that the loan would be disbursed in accordance with the construction schedule agreed between him and the defendant. Of course, the plaintiff understood that upon executing the instrument of charge, that in the event that he defaulted in repaying the amount advanced, the defendant would be at liberty to exercise its statutory power of sale as contained in the instrument of charge to sell the suit property to recover the amount advanced together with any interest that may have accrued.

From the evidence adduced, it was clear that the plaintiff breached the terms of the loan agreement. He failed to execute a banker's order in favour of the defendant to enable the defendant be paid the agreed monthly installments due. Uncontroverted evidence was adduced that the plaintiff repaid only one installment and thereafter refused to make any further payment. It was also clear from the evidence that the plaintiff did not apply the sum of Kshs.600,000/= in accordance with the construction schedule that he had agreed with the defendant. There is evidence which suggests that the plaintiff indeed diverted the sum advanced from the purpose which he indicated to the defendant that he was borrowing the money.

That was the reason why the valuer contracted by the defendant could not see any construction activity on the suit premises when he made a visit. In fact, he commented that the construction site appeared abandoned.

I therefore hold that the defendant established, to the required standard of proof on a balance of probabilities, that it was the plaintiff who breached the terms of the loan agreement. As regard the plaintiff's complaint that the defendant's failure to disburse the balance of Kshs.400,000/= had resulted in his failure to complete the construction of his house, I hold that the plaintiff placed no evidence before this court to support such contention. It was clear from the plaintiff's own evidence and that of his witness, the Quantity Surveyor, that even if the defendant disbursed the said sum of Kshs.400,000/=, the house would still not have been completed.

According to the said Quantity Surveyor, it would have required the sum of Kshs.7.3 million for the house to be completed. With the greatest respect to the plaintiff, I think his case is that of a person overreaching his financial capability. It was clear that the plaintiff embarked on a construction, which with the benefit of hindsight, would have been clear to him that he could not afford with his current income. By borrowing an amount that would not, in the circumstances enable him complete the construction of the house, the plaintiff was embarking on a financial mission that was bound to cause him grief. This is because he would be required to pay the monthly installments from his salary yet he would not be in a position to enjoy the benefit of residing in a completed house.

As regards issue (ii), the evidence adduced did not support the contention by the plaintiff that his loan ought to have been transferred to the mortgage scheme entered between the University of Nairobi and the defendant. Uncontroverted evidence was adduced by the defendant that by the time the concessionary loan scheme was launched, the plaintiff had already been advanced the loan. The terms of the loan advanced to the plaintiff was therefore contained in the instrument of charge, the letter of offer and the conditions of loan which the plaintiff executed on acceptance of the letter of offer. The plaintiff cannot therefore say that he ought to have benefited from the University of Nairobi Mortgage scheme. The defendant was under no legal obligation to transfer the loan advanced to the plaintiff to the then new scheme put in operation by his employer with the defendant.

In answer to issue (iii), it is clear from the reasons stated above that it was the plaintiff who has been in breach of the terms of the loan agreement. He was advanced a sum of Kshs.600,000/= which he has failed to repay. Whether or not the defendant disbursed a further sum of Kshs.400,000/= to the plaintiff as required by the loan agreement is neither here nor there. The plaintiff is under legal obligation to repay the amount that was already advanced to him together with the accrued interest and any other recoverable charges. The plaintiff cannot hide behind the fact that the defendant had failed to disburse the balance of the agreed amount to refuse to pay the amount that was already advanced to him. I think the adage that what belongs to Caesar must be paid to Caesar applies in this case. The plaintiff cannot run away from his financial obligations by raising spurious reasons that do not pass the common sense test which obliges one to pay what he has borrowed.

The upshot of the above reasons is that the plaintiff's suit must fail. The plaintiff did not adduce any evidence to support his claim that the defendant had acted in breach of the loan agreement and therefore should be compelled by this court to pay damages to him. On the contrary, the defendant has established, to the required standard of proof on a balance of probabilities, that the plaintiff legitimately owes an amount which was advanced him, which has remained unpaid, and which has over the years accrued interest. The plaintiff's suit lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI this 2ND DAY of SEPTEMBER 2009.

L. KIMARU

JUDGE