



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

Civil Case 405 of 2000

CREDIT BANK LTD.....PLAINTIFF

VERSUS

JASON WELLINGTON OLUGA.....1ST DEFENDANT

MARY ANYANGO OLUGA.....2ND DEFENDANT

AMON ONYANGO AKURO.....3RD DEFENDANT

JUDGMENT

The plaintiff filed suit against the defendants seeking judgment for the sum of Kshs.8,288,654.65 together with interest thereon at the rate of 28% per annum with effect from 1st November 1999 until payment in full. The plaintiff further prayed to be awarded cost for the suit. In its plaint, the plaintiff averred that on 28th October 1991, at the request of the 1st defendant, the plaintiff advanced to the 1st defendant the sum of Kshs.2,000,000/=. The loan was secured by a property known as Kisumu Municipality Block 4/147 registered in the names of the 2nd and the 3rd defendant. In addition to the security, the defendants executed personal guarantees to pay the outstanding amount whenever the same shall be demanded by the plaintiff. The plaintiff averred that in breach of the terms of the loan agreement, the 1st defendant failed to pay the amount advanced together with the accrued interest. In exercise of its statutory power of sale, the plaintiff sold the charged property and was able to recover the sum of Kshs. 2,000,000/=. After the sale of the charged property, the plaintiff claimed that the amount that was still owed by the defendants was Kshs.8,288,654.65 which payment the plaintiff was demanding together with interest at the rate of 28% per annum until payment in full. The plaintiff averred that despite demand, the defendants had failed to pay the said outstanding loan amount hence the filing of the present suit.

In their defence, the defendants denied owing the amount claimed by the plaintiff in its plaint. The defendants put the plaintiff to strict proof thereof. The 1st defendant denied the averment by the plaintiff that the suit property had been sold. He averred that the charged property should not have been sold in view of an existing court order restraining the plaintiff from selling the charged property. The defendants averred that the plaintiff and the 1st defendant had entered into a consent order in Nairobi HCCC No.1660 of 1996 by which an advocate, Jim Choge was ordered by the court to settle the amount owed by the 1st defendant to the plaintiff. The defendants were of the view that the matters in issue in the present suit were substantially similar to the matters in dispute in Nairobi HCCC No.1660 of 1996 which was resolved by consent of the parties. The defendants further averred that pursuant to the said consent order, the plaintiff was estopped from charging further interest at bank rates in regard to the loan that

advanced to the 1st defendant and therefore the plaintiff was not entitled to payment of any interest. The 2nd and 3rd defendants denied that they were issued with demand notices prior to the plaintiff filing suit. The defendants urge the court to dismiss the plaintiff's suit with costs.

After the parties to this suit concluded the preliminaries, including discovery and settling on agreed issues for determination by the court, the case was fixed for hearing. At the hearing of the case, the plaintiff called one witness, PW1 Eric Maina Nyachae, the credit and recoveries manager of the plaintiff. The defendants called one witness DW1 Joseph Orangi Getanke, an executive officer of the High Court, Nairobi. DW1 produced into evidence the court file in respect of Nairobi HCCC No.1660 of 1996 Jason Wellington Oluga vs Credit Bank Ltd & Jim Choge. After the close of both the plaintiff's and the defendants' case, counsel for the parties to this suit filed written closing submissions in support of their respective clients' cases.

The facts of this case as can be gleaned from the evidence adduced by the witnesses in this case are as follows:

On 17th October 1991, the 1st defendant applied to be advanced the sum of Kshs.2,000,000/= by the plaintiff. On 28th October 1991, the plaintiff agreed to advance the 1st defendant the said sum of kshs.2,000,000/= provided the 1st defendant fulfilled certain conditions, including offering suitable security and further executing a personal guarantee to repay the amount advanced. The 1st defendant accepted the terms of the loan advance and duly offered a property registered in the names of the 2nd and 3rd defendant as security. The property is known as Kisumu Municipality Block 4/147. The charge was prepared and duly executed by the 2nd and 3rd defendants. The charge was duly registered and noted in the title of the said property as an encumbrance. The 2nd and 3rd defendants executed personal guarantees signifying that they would pay the amount advanced in the event that there would be default in repayment by the 1st defendant.

From the evidence adduced by the plaintiff's witness, it was apparent that the 1st defendant defaulted in repaying the amount that was advanced together with the accrued interest. The plaintiff sought to exercise its statutory power of sale by realizing the security charged to it. The first attempt to sell the suit property was made in 1996. The 1st defendant filed suit and sought to restrain the plaintiff from exercising its statutory power of sale. The basis of the 1st defendant's suit was that his then advocate, Jim Choge had agreed to pay to the plaintiff the then outstanding amount and had given professional undertaking to that effect. The case is Nairobi HCCC No.1660 of 1996. On 11th July 1996, the following consent was recorded before Ole Keiwua J (as he was then):

“By consent the 2nd defendant to deposit Kshs.1.5 million with the 1st defendant on or before 4 pm today the 11th July 1996. Upon the deposit the 1st defendant will instruct the auctioneers to postpone the sale due on 12.7.96. The costs of this application together with the auctioneer's costs of postponing the sale shall be borne by the plaintiff upon proof that the sale has been postponed. That payment of auctioneers and 1st defendant's costs of application must be made today. This application (is fixed) for hearing on 29.7.96.”

It is this consent that forms the basis of the defendants' defence. The defendants claimed that the said consent absolved the defendants, and particularly the 1st defendant from the legal responsibility to repay the loan together with the accrued interest to the plaintiff.

It was common ground that the above suit was dismissed for want of prosecution on 16th October 2000. The allegation by the defendants that Jim Choge advocate paid the outstanding amount to the plaintiff that was due in respect of the loan that was advanced to the 1st defendant is not supported by any evidence. There was no documentary evidence to support the 1st defendant's assertion that the loan was repaid. What was clear was that the said advocate issued several cheques to the plaintiff's advocate which when presented to the bank were returned unpaid. The non-payment of the amount due by the said advocate

resulted in bankruptcy proceedings being instituted against the said advocate. For the purpose of this suit, the defendants failed to establish, as per their defence, that the said advocate had paid the outstanding loan amount due to the plaintiff together with the accrued interest.

The plaintiff further established that due to persistent default on the part of the 1st defendant, it exercised its statutory power of sale on 2nd July 1999 and sold the charged property. The charged property was sold at Kshs.2,000,000/= to a company known as Yess Holdings Ltd of P.O. Box 225, Kisumu. Although the defendants disputed this fact, from the bank statements produced as evidence by the plaintiff, it was evident that the proceeds of the said sale were deposited in the 1st defendant's loan account. No evidence was adduced by either the plaintiff or the defendants to establish the actual registered owner of the charged property at the time of the hearing of the case. According to the plaintiff, after the sale of the charged property, the defendants, pursuant to the personal guarantees that they executed when the loan was disbursed, were required to settle the remaining balance of the loan amount. The plaintiff established that at the time the suit was filed the 1st defendant owed the plaintiff the sum of Kshs.8,288,654.65. According to the plaintiff, the said amount continued to accrue interest at the rate of 28% per annum until payment in full.

The issue for determination by the court is therefore whether the plaintiff established to the required standard of proof on a balance of probabilities that indeed the defendants owed it the said sums of Kshs.8,288,654.65 as at 1st November 1999. The other issue for determination is whether the defendants, and particularly the 1st defendant, established to the required standard of proof that the loan had been repaid when the plaintiff entered into a consent agreement with the 1st defendant and his former advocate, Jim Choge. On the first issue, it was evident that the 1st defendant applied for and was advanced the said sum of KShs.2,000,000/=. The loan was secured by a first charge over a property known as Kisumu Municipality Block 4/147 registered in the names of the 2nd and 3rd defendants. The 2nd and 3rd defendants further executed personal guarantees to which they bound themselves to repay the amount advanced plus any accrued interest in the event that the 1st defendant defaulted in repaying the said advanced sum.

It was clear from the evidence adduced by the plaintiff that the 1st defendant made no effort to repay the amount advanced plus the accrued interest. A short while after the said amount was advanced, the 1st defendant fell hopelessly in arrears to an extent that the plaintiff attempted to realize the charged security in 1996. This first attempt was frustrated when the 1st defendant filed Nairobi HCCC No.1660 of 1996 Jason Wellington Oluga vs. Credit Bank Ltd and Jim Choge. It was clear that although the 1st defendant attempted to have Jim Choge held liable to settle his debt, the plaintiff was unable to get any payment from the said Jim Choge. The thrust of the defendants' defence was that they should not be held liable for the debt on account of the fact that the same had been taken over by the said Jim Choge. I have perused the proceedings of Nairobi HCCC No. 1660 of 1996. While it is true that Jim Choge had agreed to pay part of the debt owed by the 1st defendant to the plaintiff, it was evident that the said Jim Choge did not settle the said debt.

On the second issue, it was therefore clear that no evidence was adduced by the defendants to support their claim that the said Jim Choge should or ought to have been held responsible for the loan that was advanced to the 1st defendant. The consent order that was recorded in court on 11th July 1996 did not release the 1st defendant from liability in regard to what was expected of him pursuant to the instrument of charge. The said Jim Choge did not enter into agreement with the plaintiff that he would take over the debt of the 1st defendant. I therefore hold that the plaintiff established that it properly exercised its statutory power of sale by selling the charged property to settle the amount which was then outstanding in respect of the loan that was advanced to the 1st defendant.

I was further satisfied to the required standard of proof on a balance of probabilities that after the said sale of the charged property, the balance of the loan that remained outstanding was KShs.8,288,654.65. I therefore enter judgment in favour of the plaintiff as against the defendants, jointly and severally, for the

said sum of KShs.8,288,654.65 as at 1st November 1999. I further order that the said amount will attract interest at the prevailing commercial rates of 16% per annum until payment in full. The plaintiff is awarded costs of the suit.

DATED in NAIROBI this 27TH day of OCTOBER 2009.

L. KIMARU

JUDGE