



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

**Civil Case 2112 of 1997**

**KENYA NATIONAL CAPITAL**

**CORPORATION LIMITED .....PLAINTIFF**

**VERSUS**

**GILBERT M NYAKI.....1<sup>ST</sup> DEFENDANT**

**P. L. SIMANI ADVOCATE .....3<sup>RD</sup> PARTY**

**JUDGMENT**

**Pleadings**

1. The Plaintiff granted a loan of shs.750,000 to the defendant, the terms and conditions governing the loan repayment were stated in a letter of offer dated 30.4.1992. The security held for the loan was a residential plot in Mombasa known as LR No. 6543/Section 1/Mainland north; it was specifically provided in that letter of offer that the loan facility was for a maximum of six months. The interest chargeable was 21% per annum and the Plaintiff reserved the right to change the interest rates. A charge over the suit premises was also registered.
2. The Defendant defaulted in repayment and after seeking several indulgencies from the plaintiff, sometimes in August, 1993 the plaintiff released to the defendant's advocates the title documents which were charged to enable the defendant sell the property by way of Private Treaty and utilize the proceeds thereto to settle the loan account. The defendant was not able to dispose of the property until March, 1996 and a sum of kshs.1.177,450/= was released to the Plaintiff but it was not sufficient to cover the loan account. After the application of the sum remitted there was a shortfall of Kshs.1.378,954/= as at 22<sup>nd</sup> August, 1997.
3. The Defendant filed a defence in which he denied the claim in general and specific terms. The defendant blames the Plaintiff for sending the title documents to an advocate by the name P. L. Simani who misplaced the documents from 26<sup>th</sup> August, 1993 up to when the Plaintiff was able to apply for provisional titles which was about the 18<sup>th</sup> November, 1994. The Defendant claims that the interest rate charged on his loan account when his title documents were misplaced by Mr. Simani made it impossible for the loan to be repaid. Eventually the Defendant was able to sell the property to one **Ahmed Salim Bagha** for 1.6 million on 1<sup>st</sup> March 1996 and the defendant contends the said sum was forwarded to the Plaintiff and should have cleared the entire outstanding loan.
4. Mr. P. L. Simani was joined as a third party in this proceedings, he also filed a defence denying

liability to the plaintiff. He received the title documents from the Plaintiff against a professional undertaking which was specifically given to the Plaintiff that the loan account would be settled once the transfer was registered in his client's name. He denied that he had any obligations to pay the defendant's loan because the professional undertaking was not given to the defendant. The Third Party was not a party to the loan agreement there is no reason why he should be made to pay the outstanding loan.

### **Evidence**

5. The Plaintiff gave evidence in support of the claim through Catherine Muthiora (PW1). This witness confirmed that **Kenyac** which advanced the loan to the defendant was taken over by the National Bank in 1999. Prior to that, **Kenyac** was a subsidiary of the National Bank of Kenya. PW1 produced documents to show that on 30<sup>th</sup> April, 1992 the plaintiff was granted a loan of Kshs.750,000/= which was a short term loan for a period of six months to enable the plaintiff purchase the suit premises according to the terms and conditions stipulated in that letter of offer.

6. However the defendant fell in arrears and wrote several letters seeking for indulgence as he sought to sell the charged property by way of a Private Treaty. Sometimes in March 1993 the defendant presented a draft sale agreement entered into between himself and Paramujit Singh Viridi who was to purchase the property for 1 million shillings. The Third Party gave the professional undertaking requesting for the title documents and the discharge of charge to be released to enable the sale transaction proceed, the third party gave his professional undertaking to hold the documents to the plaintiff's order and to pay the entire outstanding loan once the transfer was registered in the name of the purchaser.

7. The documents were forwarded to Mr. Simani, who misplaced them, after several correspondences with the plaintiff the Defendant applied for provisional titles which was gazetted on 18<sup>th</sup> November, 1994. Eventually the property was sold and a sum of Kshs.1.177,450/= was received by the Plaintiff leaving a shortfall which is now claimed.

8. The Defendant also gave evidence, he admitted having borrowed the loan and having fallen in arrears, however he blamed the Plaintiff for the delay between 26<sup>th</sup> August, 1993 and November, 1994 when he was able to apply for the provisional title. The Plaintiff's were faulted for forwarding the documents to Mr. Simani who misplaced them, thus the defendants lost the opportunity of selling the property which was then being sold for 1 Million and the outstanding loan was kshs.873,568.40/=.

9. The Plaintiff insisted that the defendant should follow the documents personally despite the fact that the undertaking was between the Plaintiff and the Advocate. The Defendant insisted that he should not be penalized for the interest accrued while the documents had been misplaced. Further the property was sold and all the proceeds from the sale were paid to the loan account, thus the defendant claimed that he should not be followed for any shortfall.

### **Submissions**

10. The Plaintiff filed written submissions and urged the court to find that the defendant was advanced the loan; he failed to discharge the burden of proof that he had paid the loan. On the issue of the loss of documents of title, it is the defendant who sought for indulgence to be able to sell the property by way of Private Treaty and introduced a buyer to the Plaintiff. The documents were released to the buyers advocate; the same advocate was also acting for the defendant. The Plaintiff was thus acting as an agent of the defendant the documents were released at his request and instance.

11. In any event the undertaking was in the interest of protecting the plaintiff who had charged the property. Furthermore the defendant enjoined a third party which is indicative of the fact that defendant believed the third party was responsible for the loss of the documents and the subsequent inability to discharge his indebtedness was blamed on the third party. It should also be noted that there were no documents to show that the sale collapsed as result of the missing documents.

12. The Third Party also submitted that his obligation was to the Plaintiff to whom he had given an

undertaking to hold the documents to their order. When the documents went missing the Third Party duly informed the plaintiff and they were replaced. The plaintiff did not enforce the undertaking, the defendant himself informed the plaintiff not to enforce the undertaking. Mr. Simani submitted that it was illogical for the defendant to take out a third party notice five years later just to make allegations against him for his own failure to pay the loan. The defendant must have been shopping for somebody to blame and to pay the debt. The land was sold in 1996 and it was the defendant's responsibility to pay the loan. The defendant did not make any written submissions.

### **Analysis of the evidence**

13. In analyzing this claim by the plaintiff it is not denied by the Defendant that he took the loan and defaulted in payment. Although the defendant claims that the property was sold in 1996 and a sum of Kshs.1.6 million was paid into the account with the plaintiff, the defendant did not produce any evidence to support the allegation that after the property was sold the entire loan account was discharged.

14. The Defendant has made out a big issue over the loss of documents of title between 26<sup>th</sup> August, 1993 and 18<sup>th</sup> November, 1994 when he was able to get the provisional title. What I understood the defendant to say, is that he is not liable to pay the interest and penalties which accrued when the plaintiff had forwarded the title documents to the third party. These documents were forwarded to the third party at the request and instance of the defendant. It is the defendant who introduced a prospective buyer; both the buyer and the defendant were represented by the third party. The Defendant required the documents released to facilitate the sale in his own interest thus the plaintiff was acting as the agent of the defendant as far as the release of the documents is concerned.

15. Counsel for the Plaintiff rightly submitted that the defendant is estopped from denying that he requested the plaintiff as his agent to release the documents. Reference was made to **Halsbury's Laws of England 4<sup>th</sup> Edition Volume 2(1) at paragraph 40** in which the learned authors have expounded on what constitutes a doctrine of agency by estoppel in the following words;

***“Agency by estoppel arises where one party has so acted as to lead another to believe that he has authorized a third person to act on his behalf and that other person in such belief enters into transactions with the third person within the scope of such ostensible authority”***

16. As regards the third party, the defendant was not able to show any nexus between him and with the loan that he owes the Plaintiff. The professional undertaking was between the Third Party and the Plaintiff. It is the Plaintiff who ought to have enforced the professional undertaking against the Third Party. I find the Plaintiff has been able to prove their case to the required standard. The Defendant borrowed the loan in 1992, he defaulted in repayment until February, 1996 when a sum of 1,177,450/= was paid into the account leaving a shortfall which the Plaintiff is now claiming. Had the defendant followed the terms set out in the letter of offer, a loan which was advanced in September, 1992 ought to have been repaid in March 1993.

17. Accordingly I enter judgment for the Plaintiff for the sum of Kshs.1.378,954/= with interest at court rates from 22<sup>nd</sup> August, 1997 until full payment. The Plaintiff will also be entitled to costs of this suit. The claim against the third party is dismissed and since the third party was acting in person there will be no order as to costs.

JUDGMENT READ AND SIGNED ON **4th December 2009** AT NAIROBI.

**M. K. KOOME**

**JUDGE**