



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

Civil Suit 1480 of 2005

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

JUDGMENT

The plaintiff claims in its plaint that upon registration of a charge in its favour against M/S Kisekem Ltd's property situate in Eldoret Town and known as **Title No. Municipality/Block 6/231** (the property) on 8th November 1993, it advanced a sum of Kshs.1.5 million to one Willy Kamuren. When the said Kamuren defaulted in the repayment of that sum and the plaintiff sought to realise the security it was shocked to learn that before the registration of the said charge in its favour the said property had been subdivided into two parcels known as **Title No. Eldoret Municipality Block 6/301** and **Eldoret Municipality Block 6/306** (the subdivisions) both of which had been allocated to third parties. The plaintiff is therefore unable to realize the security and recover the outstanding amount. It faults the defendant for failing to close the Register for the suit property upon subdivision and instead registering a charge in the plaintiff's favour against the title of a property which did not exist. In the circumstances it claims from the defendant indemnity and/or special damages in the sum of Kshs.8,844,702.80 with interest thereon at the rate of 28% per annum from 29th October, 2002 until payment in full.

Upon being served the Attorney General filed a defence in which he made a general denial of the claim and stated that the charge against the charged property in favour of the plaintiff is still subsisting and that the subdivisions are not of the charged property.

When the suit came up for hearing before on 16th October 2009, though served, the defendant did not appear. I therefore allowed the plaintiff to formerly prove its case.

Jennifer Meli, PW1, testified that she is an officer in charge of recoveries at the plaintiff's Nakuru branch. On 16th July 1993 the plaintiff approved Mr. Willy Kamuren's application for a loan of Kshs.1.5 million to be secured against the said property. She produced a certificate of official search showing that a charge in the plaintiff's favour was duly registered against the property on 8th November 1993. Upon the customer's default in the repayments, the plaintiff instructed M/S Highland Valuers of Eldoret to value the property for purposes of ascertaining the market price to enable it realize the security. The said valuers surprised them when he stated that the property had prior to the registration of the charge in favour of the plaintiff been subdivided into two and the subdivisions thereof allocated to third parties. She said the plaintiff is therefore unable to realize the security and claims indemnity in the sum of Kshs.8,844,702.80 due to it as at 29th October 2002 together with interest thereon as prayed in the plaint. She repeated the averments in the plaint that the plaintiff's claim is based on the ground that the defendant failed and/or neglected to close the Register in respect of the suit property upon subdivision and instead went ahead and registered a charge in the plaintiff's favour against a property which did not exist. She produced several documents including a statement showing that as at 29th October 2002 the customer owed the plaintiff the sum claimed in the plaint.

Samuel K. Chemelil, PW2, is a Director of M/S Highland Valuers Ltd. He testified that on the plaintiff's instructions he obtained from the Land's Office at Eldoret a certificate of official search which indicated that the charge in favour of the plaintiff was still registered against the suit property. However, upon obtaining the Registry Index Map of the area he learnt that the suit piece of land had in 1992 been amalgamated with a road reserve and subdivided into four parcels all of which had been allocated to third parties. He thereafter advised the plaintiff of the impossibility of realizing the security. He produced five maps showing the amalgamation and the subdivisions and certificates of official search showing that the subdivisions resulting from the amalgamated piece of land are registered in the names of third parties.

As I have stated the defendant did not appear in court during the hearing. Therefore the evidence tendered on behalf of the plaintiff by the two witnesses stands uncontroverted. The RIM produced by PW2 as **Exh.1** shows that there is an 18.00 metres wide road between the suit piece of land that is Title No. Eldoret Municipality/Block6/231 and Title Nos. Eldoret Municipality/Block 6/22 & 23. That is the same information on the Survey Plan **Exh. 5** for the whole of Block 6 Eldoret Municipality. **Exh. 1** shows the suit piece of land as comprising of 0.2750 of a hectare. That is the same acreage stated in the Certificate of Official Search issued by the defendant immediately after registering the charge in favour of the plaintiff. From the Director of Survey's letter dated 8th May 1992 to the Commissioner of Lands and the Commissioner of Land's letter dated 23rd September 1998 it appear to me that there was correspondent between those two offices regarding the subdivisions of the suit piece of land. The Commissioner of Land's said letter confirms PW2's evidence that the suit piece of land was amalgamated with part of the road reserve before further subdivisions creating Plot Nos. Block 6/301 & 306. It refers to Survey Plan F/R No.172/1 which is **Exh. 3**. The letter further stated that the amendment was to be done on this map as per the allocation that resulted in Parcel Nos. Block 6/301 and 306 (Map F/R No.222/104) **Exh. 2**. The Survey Plan **Exh.6** shows that in place of the suit piece of land there are now Parcel Nos. 301, 302, 306 & 404 as PW2 stated.

It is clear from all these that the suit piece of land was amalgamated with a road reserve and subdivided into four portions known as Block 6/301, 302, 306 & 404 although it is not clear from the survey plans referred to above when the subdivisions were completed.

The Certificates of Official Search on pages 41 & 42 of the plaintiff's documents shows the owner of

Title No. Eldoret Municipality/Block 6/301 as Blue Shield Insurance Company Limited and Title No. Eldoret Municipality/Block 6/306 as Michael Kipkering Cherwon. This is prove of the fact that the defendant having issued the Title Deeds in respect of these two pieces of land way back in 1992 was aware of the subdivisions even before the charge in favour of the plaintiff was registered. The plaintiff is therefore right in its claim that the suit piece of land does not exist any longer. Consequently I find that the plaintiff has proved its claim in a balance of probability and I enter judgment for it as prayed in the plaint.

DATED and delivered at Nakuru this 1st December, 2009.

D. K. MARAGA

JUDGE.