



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 2143 of 1998

TRUPHENA ATIENO OSIEMO.....PLAINTIFF

-versus-

KENYA COMMERCIAL BANK LIMITED...DEFENDANT

J U D G M E N T

Parties in this suit informed me at the start of the trial that they are relying upon a statement of claim dated 24th September 1998 and filed on same date by the Plaintiff, and the Defence having a counter claim dated 5th November 2001. Mr. Osiemo appeared for the Plaintiff while Mr. Ngala appeared for the Defendant. The suit arises out of a Bank loan which was granted to one Elijah R. Ombayi (the Borrower) following a charge agreement between the Plaintiff (chargor) and the Defendant (chargee) as well as the said Borrower – dated 28th July 1993 – whereby the Plaintiff gave as security for the loan her parcel of land situate in the City of Nairobi and registered as LR NO. NAIROBI/BLOCK 72/357 upon which the Plaintiff chargor – says has constructed her residential three bedroomed double storey house made of natural stones.

In the plaint, the Plaintiff says she charged that suit property in favour of the Defendant and guaranteed the repayment, by the Borrower, of the sum of Kshs.110,000/= together with interest. That allowed the borrower to overdraw his current account with the Defendant or allowed the Defendant to grant the Borrower other financial accommodation from time to time but in each case the aggregate amount was not to exceed Kshs.110,000/=. The lower limit was to be fixed from time to time by the Defendant.

The loan so granted was effective from 30th July, 1993 and the Borrower's Current Account was No.233743184 at the Defendant's KICC Branch in Nairobi.

The Plaintiff says in paragraph 8 of her plaint that from 6th August 1993 onwards, the Defendant wrongfully and in breach of the terms of the charge and without the consent or knowledge of the Plaintiff did allow, permit or authorize the Borrower to continually overdraw the said account by an amount aggregate exceeding the secured debt and which together with the interest accrued thereon stood at Kshs.2,472,679/60 as at 31st May 1997.

According to the Plaintiff, that conduct by the Defendant had the effect of fully relieving and discharging the Plaintiff "from all and any liability under or arising from the guarantee secured by the said charge."

The Plaintiff claims that without prejudice to the foregoing, the Borrower had continued to pay in money to the credit of his said account and that between 31st August, 1993 and 13th January, 1995 those

payments amounted in aggregate to Kshs.640,000/= which, under the Rule in Clayton's case, more than extinguished the secured debt. But the Defendant now intended and has threatened to sell the suit property in purported exercise of its statutory power of sale; yet the Defendant has not even complied with sections 65(2) and 74 of the Registered Land Act (Cap 300 Laws of Kenya).

In the circumstances therefore, the Plaintiff prays for judgment against the Defendant for:

(A) A declaration that the Plaintiff has been fully relieved and discharged from all and any liability under or arising from the guarantee secured by the charge dated 28th July 1993, and registered on 4th April, 1996.

(B) A declaration that the Defendant has no statutory power of sale over the suit property and that the intended sale of the suit property by the Defendant is illegal, wrongful and unlawful.

(C) An order that the Defendant do forthwith execute a Discharge of the charge dated 28th July 1998 and registered on 4th April 1996.

*(D) A perpetual injunction to restrain the Defendant, by itself, its officers, servants or agents or Court Brokers or Auctioneers or otherwise howsoever from auctioning, selling, transferring or in **any other manner whatsoever dealing with the suit property, whether as a chargee in exercise of its purported power of sale or otherwise howsoever.***

(E) The costs of this suit.

(F) Further or other relief.

In her evidence, the Plaintiff a retired teacher, told the court she lives in house number 76A on the suit piece of land. She showed the court a certificate of lease P. Exh. 1, of the suit property in her name describing it as "a title deed". She said that in July 1993 she guaranteed a loan taken by Elijah Mbaye, also pronounced as Ombayi, the Borrower, because the loan was intended for the education of a child who was going abroad. The loan was to be Kshs.110,000/= or lower. She said she signed some documents and gave her "title deed" for the suit property, but I note that was in July 1993 and the certificate of lease P. Exh.1 was issued on 8th February 1994 and could not therefore have been available to the parties in July 1993.

No doubt the documents the Plaintiff said she signed included the charge document, P. Exhibit 2, also signed by the Borrower on 28th July 1993.

The Plaintiff told the court that she had left the "title deed" together with the charge document with the Bank advocate and that when the Borrower returned the "title deed" to her in December 1993, she said "title deed" had no endorsement and that according to her, the charge was for three months and therefore when the "title deed" was returned to her, she knew there was no more loan. She said the Borrower, on giving her the "title deed", told her he had had a harambee in August 1993 and the money raised cleared the loan which was therefore no longer there.

But in 1996 the Plaintiff received a copy of a letter (P. Exh.3) addressed to the Borrower demanding payment of the loan in the sum of Kshs.1,952,433.15. The letter was from the Defendant's advocate who similarly wrote another letter dated 30th June 1997 demanding payment of Kshs.2,375,694.65 (P. Exh.4).

That prompted the Plaintiff to consult M/s Kariako Tobiko, Advocates, who responded on 7th July 1997 through their letter P. Exh.5 and another letter dated 21st August 1997, P.Exh.6.

The Plaintiff said that when she inquired from the Borrower, he repeated to her that he had paid and cleared the loan. The Borrower went to the Defendant and obtained a bank statement, produced as P. Exhibit 9 which reflected a number of credit entries with the effect that the Borrower had been paying the

loan. An example is the credit entry for Kshs.50,000/= made on 31st October 1993.

But later the Plaintiff learned from the Standard Newspaper of 8th September 1998 that her house was to be auctioned on 26th September 1998 as seen in P. Exhibit 10. According to the Plaintiff, at that time she did not owe the Defendant any money and to-date she owes the Defendant no money even taking into account the Defendant's counter-claim in the Defence.

The Plaintiff added she was not the Borrower. She only guaranteed a loan she claims was fully paid and therefore wants this court to dismiss the Defendant's counter claim and grant the Plaintiff the reliefs she had prayed for. She pointed out the Defendant has not been consistent in the sum of money demanded from her, and gives an example from the Bank Statement, P. Exhibit 9, where the balance or amount shown overdrawn was reading Kshs.2,472,679.60 being a figure different from figures in demand letters.

During cross examination the plaintiff said that although the Borrower told her in December 1993 that he had completed paying the loan and returned her "title deed" to her, looking at P. Exhibit 9 she agreed that an entry in that Bank Statement dated 5th December 1993 showed it was a debit entry for Kshs.376,273.60 meaning the account was overdrawn by that amount. At this stage the Plaintiff said the statement was given to her when her lawyer wrote to the Defendant demanding the statement.

She said the borrower was her late husband's cousin and not her husband and added that she could not have been discussing with him about bank charges because once he returned to her, her "title deed" saying the loan had been paid, she knew that was the end of her obligation as she had signed for Kshs.110,000/= only and no more. If there was further loan she would have been made to sign for further obligation which she did not see happen. The Plaintiff put a lot in what she called "the returning to her of her title deed by the Borrower". She stated, for instance: -

"My understanding was that as long as the borrower did not return the title deed to me while he continued benefiting from the loan which he had to keep up to Kshs.110,000/= only, I remained guarantor. But as soon as he returned the title deed to me, I ceased being the guarantor."

She continued to say, during cross examination, that she used to be sent copies of letters the Defendant was sending to the Borrower demanding payment and that when the bank statement, P. Exhibit 9, was brought, she went with the Borrower to discuss that statement with her then lawyer M/s Keriako Tobiko and the three of them agreed that from that statement the loan had been cleared. By that time this case had been filed. The Plaintiff said her "title deed" (certificate of lease) was returned to her by the Borrower before registration of the charge, P. Exhibit 2, was done on 4th April 1996, having been signed on 28th July 1993 at the time P. Exhibit 9 was having a debit balance of Kshs.19,024.75 and remained with a debit balance until 25th November 1993 although the total sum of money, Kshs.310,000/= which had been deposited since the signing of P. Exhibit 2 had been sufficient to fully cover the Kshs.110,000/= she had signed for.

The Defendant on its part, while admitting the existence of the loan agreement in terms of P. Exhibit 2 avers that the Defendant was at liberty to vary the maximum limit of the over-draft without affecting its rights under the charge and that therefore in permitting the Borrower to overdraw his account in excess of Kshs.110,000/= as alleged in paragraph 8 of the statement of claim, the Defendant was not wrong and in breach as the said chargor the Plaintiff, is not entitled to say that by reason of the matters stated in paragraph 8 aforesaid, she was relieved or discharged from all and or any liability under or arising from the guarantee secured by the charge.

The payment of monies made by the Borrower as alleged in paragraph 10 of the statement of claim did not extinguish the Plaintiff's debt because the charge was a continuing security for the payment of the charged debt and interest thereon or so much thereof as would from time to time be outstanding in the account of the Borrower and as such the operation of the Rule in Clayton's Case is excluded. The Plaintiff is therefore truly indebted to the Defendant and the Defendant intends to recover the debt by way of exercising its statutory power of sale of its security for the debt, having complied with the mandatory

legal requirements and its statutory power of sale has arisen.

Following from the above, the Defendant included in its defence a counter-claim of Kshs.357,149.70 as at 20th November 2000 which sum was accruing interest at the rate of 13.75% per annum – compounded monthly from 20th November 2000 until payment in full, this being the amount of the charge debt. The Defendant claims costs of this suit and also prays for any other or further relief the court may deem fit to grant.

The Defendant avers that the Plaintiff is indebted to it as aforesaid, not only as a guarantor for the Borrower, but also as principal debtor to the Defendant.

Mr. David Kiprono Chirchir, who gave evidence as DW 1, was the only witness for the defence just as the Plaintiff was the only witness on her side. He told the court he was currently in charge of loans and advances at the Defendant's KICC Branch and was conversant with the issues in this suit having looked at records kept in his office.

Looking at the charge document, P. Exhibit 2, Mr. Kiprono Chirchir told the court that although the over-draft facility was for Kshs.110,000/= paragraph (b) on page 2 of the charge gave the Borrower over-draft facilities without time limit. He pointed out there were other charges such as commission and interests to be paid by the Borrower. He said that following the signing of the charge; P. Exhibit 2, on 28th July 1993, the Borrower was given the first over-draft on the same day before the charge was registered. Otherwise the charge would have been registered first before the first over-draft was given.

This witness was taken through entries in P. Exhibit 9, both credit entries and debit entries and it is clear from the evidence before this court that the picture the Plaintiff gave is the opposite of the picture Mr. Kiprono Chirchir gave. While the Plaintiff told the court without supporting figures that the Borrower told her in December 1993 that he had already paid and cleared the loan, Mr. Kiprono Chirchir showed the court evidence from P. Exhibit 9 that the over-draft kept on fluctuating at figures above Kshs.110,000/= right from the beginning when the loan agreement was signed on 28th July 1993 notwithstanding the credit entries made during the same period, so that as at 3rd December 1993, there was a debit balance of Kshs.374,273.40. As there was no payment of the loan thereafter that debit balance had to keep on growing. By the time the Defendant was writing to the Plaintiff D. Exhibit 1, a letter dated 23rd September 1998, the debit balance was Kshs.611,330.80 and as at 16th April 1999 that figure had grown up to Kshs.690,772.60 as can be seen in D. Exhibit 3. This witness also produced D. Exhibit 2 which is similar to P. Exhibit 9.

Mr. Kiprono Chirchir was not at the Defendant's KICC Branch when this credit facility was given or when the said credit facility was being administered by the Defendant, but was speaking from the record kept by the Defendant. He explained that higher amounts like Kshs.120,000/= withdrawn about 20th August 1998 could be withdrawn with prior arrangement such as payment within a limited time. Otherwise he said the withdrawals made were in keeping with the terms of the charge; and that the charge did not cover previous debts even though at the time the charge was agreed upon, there were previous debts which were already attracting interest and other relevant levies.

I should point out here that although at the close of hearing, Mr. Osiemo and Mr. Ngala agreed to file their respective written submissions by 31st July 2008, by the time I am writing this judgment on 22nd September 2008, no such submissions are filed.

That is the case on both sides and it brings out a few important aspects which surprisingly the parties do not seem to bother about. One of those aspects is the fact that in her statement of claim and her evidence, the Plaintiff keeps talking about the presence of her "title deed" at the time she signed the charge agreement on 28th July 1993 upto December 1993 but when it comes to the point of producing the said "title deed", she fails to produce one. Instead, she produces not only "a certificate of lease" but one which was issued to her on 8th February 1994 and could not therefore have been available to her on 28th July 1993 or in December 1993.

From there, I move to the second aspect where DW 1, Mr. David Kiprono Chirchir told the court that the charge agreement did not cover overdrafts given prior to 28th July 1993. That does not agree with the conduct of the Defendant and the Borrower as reflected from the language of the charge P. Exhibit 2 especially covenant and agreement number 1 starting at bottom page 2 and ending at middle page 4 of the exhibit and also from the entries in P. Exhibit 9 and D. Exhibit 2. The Borrower, Elijah R. Ombayi, seems to have been a very good and special customer of the Defendant who, as a result, started giving the Borrower overdrafts for sometime before the signing of the charge agreement on 28th July 1993, so that by the time the charge agreement was signed and the first Kshs.110,000/= credited the Borrower's account already had an overdraft of over Kshs.19,000/=. The charge agreement limited the maximum over-draft to Kshs.110,000/= in the following terms as seen in paragraph (b) at page 2:

“The Lender has at the request of the chargor agreed to grant credit or banking facilities to ELIJAH R. OMBAYI.....hereinafter called the Borrower by permitting the Borrower to overdraw the Borrower's current account with the Lender or granting to the Borrower other financial accommodation from time to time to an aggregate amount not exceeding Kenya Shillings One Hundred Ten Thousand (Kshs.110,000/=) or such lower limit as may from time to time be fixed by the Lender and upon having the same secured in manner hereinafter appearing.”

But from what happened, and perhaps on the basis of the Defendant's previous treatment of the Borrower, the maximum limit of Kshs.110,000/= was ignored and what the Plaintiff says in paragraph 8 of her statement of claim was what happened thereby breaching a major condition of the agreement because under that agreement while the Defendant had authority to vary the amount of the loan below Kshs.110,000/=: it had no authority to give a loan of an amount above Kshs.110,000/= or any other amount, which the Defendant went on doing even to the extent of allowing an overdraft of Kshs.120,000/= at once, when the Borrower's account was already in debit by an amount up to Kshs.110,000/= and above. Payment of monies made by the Borrower as claimed in paragraph 10 of the statement of claim could not, as a result extinguish the Borrower's debt on the basis that the charge was a continuing security for the payment of the charged debt and interest thereon or so much thereof as would from time to time be outstanding in the account of the Borrower. That being the position, the Plaintiff sometimes gave me the impression she had not comprehended the nature of the loan she was guaranteeing for example when she talked of the loan having been given for three months, but some other time gave the impression she comprehended the nature of the loan like in the quotation at page 8 here.

In the circumstances, the signing of the charge agreement does not seem to me to have been of much importance. It was merely a formality for record purposes and therefore that explains the existence of the following discrepancies in this matter.

Firstly, an over-draft of Kshs.110,000/= was straight away given to the Borrower on the very day the charge agreement was signed on 28th July 1993 before that charge was registered under the **Registered Land Act (Cap 300 Laws of Kenya)** to be a legal security under the law. That money Kshs.110,000/= was therefore, in law, given by the Defendant to the Borrower on that date without a legal security. It was unsecured.

Secondly, the charge agreement signed on 28th July 1993 said in paragraph (a), top page 2 that the chargor was the registered “proprietor of the interest in the land comprised in the above mentioned title”, that is Title Number: NAIROBI/BLOCK 72/357, yet the chargor was not yet the registered proprietor of any interest in that land as at that date. As can be seen from P. Exhibit 11, a certificate of official search, the chargor who is the Plaintiff in this suit became a registered proprietor of an interest in that land only on 8th February 1994 being a period of six months after the charge agreement dated 28th July 1993 was signed. In as far as that charge was therefore based upon an interest of the chargor which was not an existing legal interest registrable under the Registered Land Act as at 28th July 1993, that charge was not enforceable under provisions of that Act.

Thirdly, following from what has been said above, at the time of the charge agreement on 28th July 1993, no title document was, and could actually be, available to the parties in the agreement to show and

confirm the quality or type of title or interest the chargor had in Title Number: NAIROBI/BLOCK 72/357.

(a) Was it an equitable interest?

(b) Was it a legal interest?

If a legal interest;

(a) Was it a lease?

(b) Was it a freehold?

The charge agreement, P. Exhibit 2, is quiet on all those aspects. So what registered interest of the chargor was that charge agreement talking about on 28th July 1993? I cannot see any and that means again that the over-drafts purported to be secured by that charge agreement, including the sum of Kshs.110,000/= over-draft given to the Borrower on that date 28th July 1993 remained, in law, unsecured.

Fourthly, although that was the legal position and an interest the chargor had in Title Number: NAIROBI/BLOCK 72/357 was registered under the Registered Land Act on 8th February 1994, no registration of the charge agreement in P. Exhibit 2 was effected under the Registered Land Act until 4th April 1996. With the registration of the lease on 8th February 1994, the interest the chargor had in Title Number: NAIROBI/BLOCK 72/357 had been revealed to be a LEASE INTEREST. During the hearing of this suit, I got the impression that the Defendant, just as the Plaintiff is, does not know that the Plaintiff has a lease interest only. Both sides keep on talking of possession by the Plaintiff of "a TITLE DEED", document which does not, in law, and in fact, exist, not only in this matter, but also in respect of leases under the Registered Land Act and therefore a document neither party possesses as neither of them produced such a document as an exhibit before me during the hearing of this suit. Instead what was brought was a CERTIFICATE OF LEASE produced by the Plaintiff as P. Exhibit 1 and shown to have been issued on 8th February 1994 the day the lease was registered in the name of the Plaintiff. That being the position, was the Defendant clear of what interest of the Plaintiff the Defendant wanted to sell when the Defendant threatened to exercise its assumed statutory power of sale under the Registered Land Act in this matter? I have my doubts.

In any case, what overdraft could a charge worded as it is done in P. Exhibit 2, secure upon its too late registration on 4th April 1996 almost three years after signing of the said charge followed by several overdrafts over and above the original overdraft of Kshs.110,000/= given on the date the charge was signed 28th July 1993, all in disregard of the agreed maximum overdraft limit of Kshs.110,000/= I see none. I see no overdraft secured by the charge P. Exhibit 2 – whether that over-draft was given before or after the registration of the charge P. Exhibit 2 on 4th April 1996. At the same time I find the Plaintiff with no blame in all these as she remains largely an innocent sufferer in the hands of those who knew better than she knew what they were doing including the Defendant's Advocates.

The above being the position and bearing in mind and carefully considering all things that were brought to my attention during the hearing of this suit: -

(a) The Defendant's counter-claim against the Plaintiff in this suit be and is hereby dismissed.

(b) I do hereby decline to make a declaration in terms of prayer (A) of the Plaintiff's statement of claim because of the wording of that prayer.

(c) I do hereby declare that the Defendant has no statutory power of sale over the suit property and that the intended sale of the suit property by the Defendant is illegal, wrongful and unlawful.

(d) It is hereby ordered that the Defendant do forthwith execute a Discharge of and discharge the

charge dated 28th July 1993 and registered on 4th April 1996 in favour of the Defendant in the lease register of the Plaintiff's suit property NAIROBI/BLOCK 72/357.

(e) It is hereby further ordered that a perpetual injunction do issue restraining the Defendant by itself, its officers, servants or agents or Court Brokers or Auctioneers or otherwise howsoever from auctioning, selling, transferring or in any other manner whatsoever dealing with the suit property, whether as a chargee in exercise of its purported power of sale or otherwise howsoever, on the basis of the charge dated 28th July 1993 aforesaid.

(f) The Defendant to pay costs of this suit to the Plaintiff.

An appeal against this judgment is a right of the parties, and the said judgment is delivered, dated and signed at Nairobi this 29th day of September 2008.

J. M. KHAMONI

JUDGE

Present:

Mr. Osiemo for the Plaintiff

Mr. Kabiru Court Clerk