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

Civil Case 231 of 2006

MARTHA JEROTICH RUTO…….....……..PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA…….....……DEFENDANT

R U L I N G

The plaint herein was filed on 3rd May 2006. On that same date, the plaintiff filed an application for an interlocutory injunction, with a view to having the defendant restrained from selling the suit property, L.R. NO. UASIN GISHU/KIMUMU/351.

It is the plaintiff's case that the suit property was given as security for a loan of KShs. 450,000/= only. The said loan had been advanced by the defendant, to the plaintiff's daughter, Lenah J. Chesum.

As the plaintiff had paid the said sum of KShs. 450,000/=, to the defendant, she holds the view that the defendant had no right to auction her property. It is for that reason, that when the defendant served her with a Notification of Sale (through their appointed agent, Joyland Auctioneers), the plaintiff moved to court.

The defendant does not deny receipt of the sum of KShs. 450,000/=. However, it insists that the plaintiff is liable to pay the full loan amount, which, as at April 2006 was in excess of KShs. 1.7 million.

The plaintiff does not understand how her liability could have reached that amount, because she believes that the said liability was limited to a sum not exceeding KShs. 450,000/=.

The question that I need to address, on a prima facie basis, at this stage is whether or not the plaintiff's said belief has any foundation.

In her submissions, the plaintiff stated that she had redeemed the guarantee, by paying the sum of Kshs. 450,000/=. She therefore contends that she was entitled to a discharge of the charge registered against the suit property.

The defendant does not dispute the fact that the plaintiff made the following payments:

(i) KShs. 350,000/=, on 30.7.01,

(ii) KShs. 100,000/= on 28.9.01,

(iii) KShs. 60,000/= on 25.3.02,

(iv) KShs. 48,000/=, by 16.4.04.

The first two payments were said to be in relation to the sum which the plaintiff had guaranteed. Whilst the third payment of Kshs. 60,000/= was for the agreed costs of a suit which the plaintiff had filed at the High Court, in Eldoret, in 2001. That suit was filed, in an endeavour to stop the defendant from selling the suit property.

Having initially succeeded in stopping the sale, through an injunction order, the plaintiff entered into negotiations with the defendant. In her understanding, the defendant did offer to discharge the security, if the plaintiff paid KShs. 450,000/=.

According to the plaintiff, that offer is what caused her to pay the two sums totalling KShs. 450,000/=.

But, the defendant holds a completely different view. As far as they are concerned, they never at any time, led the plaintiff to believe that the security would be discharged if she paid KShs. 450,000/=

A perusal of the documents adduced in evidence reveals that on 6th February 1999, the defendant wrote to the plaintiff, notifying her, inter alia, that the debt then outstanding was in the sum of Kshs. 1,354,982.50. Although that letter purported to constitute a statutory notice, the Hon. Omondi Tunya J. found it to be invalid, in that regard. The said finding was **in MARTHA JEROTICH RUTO V NATIONAL BANK OF KENYA LTD, (ELDORET) HCCC No. 115 of 2001.**

The reason given by the court for that finding was that the notice had given the chargor a period of less than 3 months, within which to pay the loan, failing which the security was to be realised. It is on that ground that the learned judge granted an injunction to stop the sale which had been scheduled for 25th May 2001.

Thereafter, the plaintiff made the payments particularised above.

After making the said payments, the plaintiff notified the court, on 12th November 2001 that she had done so. The record of the proceedings on that date indicates that the plaintiff said:

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"I have paid O/S in full settlement and would like to withdraw the plaint. What is left is issue of costs."

Eventually, the costs were assessed at KShs. 60,000/=. The said assessment was by consent of the parties, and the same was recorded on 2nd July 2002. The assessment would appear to have been only for purposes of the record, as the plaintiff had already paid the agreed costs on 25th March 2002.

Reverting to the issue of the sum of Kshs. 450,000/=, I ask myself if the plaintiff was right to state, as she did, that the defendant had offered to discharge the security if the plaintiff paid that amount.

It is common ground that it was the plaintiff who wrote on 10th May 2001, asking the bank to release her from the guarantee, and to release her Title Deed, upon payment of KShs. 450,000/=. On 11th May 2001, her lawyers M/s Ngala & Company reiterated the said request, through their letter of that date.

The defendant wrote back on 12th June 2001, saying:

"**Kindly deposit KShs. 450,000/= immediately to enable us consider your request for discharge. Please note also that the High Court requires that the said amount be deposited in the debtor's account in our books before the next hearing of the case on 31.7.2001."**

Immediately after getting that letter, the plaintiff paid KShs. 350,000, to the defendant. That payment

prompted the bank to write on 30th August 2001, telling the plaintiff;

"**We appreciate the efforts you made by depositing KShs. 350,000/=, to reduce your guarantee in respect of the above referenced debt.**

To enable us consider your request to discharge the title deed, please deposit the balance of Kshs. 100,000/= plus KShs. 47,423-00 being legal fees incurred by the Bank in pursuit of the debt."

In the light of those two letters, the plaintiff now says that the defendant had offered to accept the sum of KShs.450,000/=, after which it would discharge the security.

In my understanding, the said two letters do not go as far as the plaintiff has said they do.

But I would not say that when the plaintiff told this court that she understood the letters to imply that the security would be discharged if she paid KShs. 450,000/=, the plaintiff intended to mislead the court. I say so because, I have the distinct impression that the plaintiff honestly believed that the security would be discharged as soon as she had paid KShs. 450,000/=.

In my considered opinion, had not the plaintiff honestly held such a belief, she would have had no reason to tell the court (at Eldoret) that she had already paid all the outstanding amount, in full settlement.

For those reasons I do not accept the defendant's contention that the plaintiff had earlier deliberately set out to mislead the court or to conceal any material facts.

It is to be appreciated that in the same manner as the defendant cannot be pinned down to any specific promise that it would discharge the security, after being paid KShs. 450,000/; so also the plaintiff cannot be pinned down to have accepted that she was liable to pay any of the amounts which the defendant had cited in its letters as reflecting the outstanding balances.

From as early as 6th May 1999, the plaintiff was talking about paying "**the loan I had guaranteed."**

Then on 10th May 2001, she wrote to the defendant, saying:

"**When I was served with the Notification of sale by your auctioneers, I went round to borrow money from friends and relatives, and now have the amount of KShs. 450,000/= which I had guaranteed. Please accept this money and release me from my guarantee. Let me have my Title Deed back and ask Lenah to pay the rest of the loan."**

It would appear to me that at all material times, the plaintiff has consistently insisted that her liability was for the sum of Kshs. 450,000/=, which she had guaranteed.

Whilst I appreciate the fact that such consistency alone may not lead to the discharge of the security, I believe that it is a clear sign of the plaintiff's position on the matter. Therefore, when she made submissions on that basis, she cannot be deemed to have intended to mislead the court, as has been suggested by the defendant.

Of course, on 5th December 2001, the defendant wrote to the plaintiff, demanding the payment of the whole debt owed by the principal borrower.

The plaintiff responded on 27th August 2002, reminding the defendant that she had paid the agreed sum of Kshs. 450,000/=, as well as the advocates costs. Once again, she asked the defendant to release the Title Deed and to discharge the charge, immediately after the plaintiff had paid the then outstanding auctioneer's charges.

From a reading of the defendant's letter dated 18th November 2004, it is clear that the plaintiff did

write to it, on 16th April 2004, requesting for a discharge of the property. The defendant declined the said request.

In the light of those continued exchanges of correspondence, the defendant erred when it faulted the plaintiff for coming to court 5 years after her proposal had been rejected. I say so because the plaintiff had obviously continued to revive the said proposals, no doubt, in the hopes that the defendant might change its mind.

For now, the defendant may need to justify its claims against the plaintiff. I say so because of two reasons. First, in the letter of offer dated 7th July 1995, the loan sum was given as KShs. 450,000/=. Under the sub-heading "security", it was provided as follows:

"**We shall hold a guarantee for KShs. 450,000.00 duly executed by Martha Jerotich Ruto.**

Supported by RLA charge over property No. Uasin Gishu/Kimumu/351 registered in the name of Martha Jerotich Ruto."

As the legal charge was expressly stated to be in support of the guarantee for KShs. 450,000/=, I hold the view that the plaintiff has made out a prima facie case, to the effect that the security too, was for a limited amount. Therefore, regardless of whether or not the defendant itself had led the plaintiff to believe that the security would be discharged if she paid the limited sum of KShs. 450,000/=, it is possible that the liability of the plaintiff was limited by law.

Of course, in arriving at this decision, I have not had the benefit of perusing the charge instrument, as it was not made available to me.

The second reason is that by a letter dated 28th May 2002, the defendant's advocates told their said client that the plaintiff;

"**has cleared everything on our side."**

That letter was copied to the plaintiff.

So, if as at that date the plaintiff had cleared everything on the side of the bank's lawyers, one wonders why the defendant would thereafter continue pursuing the plaintiff.

For those reasons, I find that it will be in the best interests of justice to safeguard the subject matter of the suit, by way of an injunction, because otherwise the suit would be rendered nugatory, as the sole prayer in the plaint is in relation to the property.

The plaintiff is awarded the costs of the application dated 3rd May 2006.

Dated and Delivered at Nairobi this 8th day of November 2006.

FRED A. OCHIENG

JUDGE