



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
HIGH COURT CIVIL CASE NO. 233 OF 2000

SIMEON JOHNSON MUTHUMA PLAINTIFF

VERSUS

SAVINGS & LOAN K (LTD) 1ST DEFENDANT

MUGA, AUCTIONEERS &

GENERAL MERCHANTS 2ND DEFENDANT

J U D G M E N T

Simeon Johnson Muthuma hereinafter referred to as the Plaintiff brought this suit against Savings and Loans Kenya Ltd. (hereinafter referred to as the 1st Defendant) and Muga Auctioneers and General Merchants (hereinafter referred to as 2nd Defendant) seeking orders:

- (1) That the court do issue a permanent injunction to restrain the Defendants from selling the Plaintiff's plot (i.e. Karatina Township Block 1/175)*
- (2) That the Court be pleased to order the first Defendant to take any other option of recovering its outstanding loan than selling the said plot.*
- (3) Costs of this suit to the Plaintiff.*

In support of his case the Plaintiff testified that he mortgaged his property known as Karatina plot No. B1/175 (hereinafter referred as "the property") to the 1st Defendant for a loan of Kshs.4 million. The loan was to be disbursed to the Plaintiff in instalments as per the architects certificate as the loan was for development of "the property". Between March 1997 and October 1997 the Plaintiff received various amounts from the 1st Defendant all totalling Kshs.3,774,510. Of this amount the Plaintiff maintained that certain amounts were subtracted by the 1st Defendant in respect of Bank charges and that in actual fact the Plaintiff received only Kshs. 3,494,510/50. He therefore maintained that a sum of Kshs.505,489/50 was not disbursed to him by the 1st Defendant. As a result the plaintiff was not able to fully complete the building on "the property" though he had done 98% of the work. He produced a valuation report done in July 1999 on the instructions of the 1st Defendant which showed the value of "the property" as 13 million with an estimated rental income of Kshs.142,000/=.

In the same month of July 1999 the 1st Defendant served the Plaintiff with a notice of intention to sell "the property" for failing to service the mortgage as a result of which the amount outstanding had risen to 6.9 million. The Plaintiff thereafter obtained an interlocutory injunction restraining the Defendants from selling "the property." The Plaintiff testified that since obtaining the court order he has made payments to the tune of Kshs.460,000/=. The Plaintiff blamed the 1st Defendant for the delay in having the building

finished. He also complained that the 1st Defendant had failed to pursue the alternative remedy of appointing a receiver manager so that the building on “the property” can be leased and rental income used to off-set the loan. He urged the court to allow him to negotiate the way forward with the Defendants.

The Defendants filed a joint statement of defence in which they admitted having agreed to give the plaintiff a construction loan which was to be disbursed in instalments according to the progress in construction. The Defendants maintained that the Plaintiff defaulted in making monthly payments as a result of which some amounts were withheld to offset unpaid interest accruing monthly on the mortgage. The Defendants maintained that the Plaintiff was in default of his obligations under the loan agreement and was therefore not coming to equity with clean hands.

The Defendant testified through the 1st Defendant’s manager of Thika Branch Robert Bomett who produced documents showing that the 1st Defendant granted the Plaintiff a loan against a charge on “the property” and that the Plaintiff defaulted in the repayments in respect of the charge and was served with the appropriate statutory notice under section 74 of the Registered Land Act and that thereafter no payments having been made, the 2nd Defendant was instructed to sell the property. He produced Bank statements showing that the Plaintiff was still indebted to the 1st Defendant.

In his submissions Mr. Wachira who appeared for the Plaintiff urged the court to find that the performance of the contract between the Plaintiff and the Defendant became oppressive because the 1st Defendant did not release the entire loan and this was a special circumstance justifying the intervention of the court, and that the 1st Defendant had the option of leasing the building on “the property” and that 1st Defendant should not be allowed to invoke only the option of selling “the property.”

Mr. Bundotich who appeared for the Defendants urged the court to dismiss the Plaintiff’s suit as the Plaintiff had failed to prove any case against the Defendants and that the court could not interfere with the 1st Defendant’s statutory powers of sale conferred on it under the charge instrument. He urged the court to reject the Plaintiff’s attempts to depart from his pleadings and find that he was bound by the terms of the contract entered into between the Plaintiff and the 1st Defendant. The Defendants relied on the following authorities:

- 1. Godfrey ngumo Nyaga v/s Housing Finance Co. of Kenya Civil Appeal No. 134 of 1987.**
 - 2. John P.O. Mutere & Another v/s Kenya Commercial Bank & Another HCCC (Nrb) 3125 of 1991**
 - 3. National Bank of Kenya v/s**
 - 1. Pipe plastic Samkolit (K) Ltd., 2. Prof. Samson K. Ongeri Civil Appeal No. 95 of 1999**
 - 4. Kenya Commercial Finance Co. Ltd.**
- v/s
- (i) Kipngeno Arap Ngeny,**
 - (ii) Berry Farms Ltd. Civil Appeal No. 100 of 2001**

It is apparent from the evidence adduced that the Plaintiff does not dispute having obtained a loan from the 1st Defendant on the security of “the property”, nor does the Plaintiff deny having defaulted in the repayment of that loan and therefore being in breach of the terms of the mortgage. The question is whether the 1st Defendant is right in exercising his statutory powers of sale or whether the court can interfere with the 1st Defendant’s exercise of this right.

It is apparent from the authorities quoted by the defence counsel that the court can only interfere with the 1st Defendant’s exercise of his statutory powers of sale under the charge “if there was no basis on which

the right could be exercised or it was being exercised oppressively.” In this case it is evident that the Plaintiff has defaulted in the repayment of the mortgage and therefore it cannot be said that there is “no basis on which the right can be exercised.” It was submitted that the 1st Defendant had acted oppressively by withholding part of the amounts due to the Plaintiff as the loan. The 1st Defendant has clearly explained why the amounts were withheld. It is evident that the Plaintiff failed to make the monthly repayments or to pay the interest on the amount already disbursed to him. In the circumstances it was not oppressive for the 1st Defendant to employ a self-help remedy by off-setting the interest due to it from the amount it was holding for the Plaintiff. I concur with the defence that the equitable maxim of he who comes to equity must come with clean hands is applicable herein.

The Plaintiff has not acted equitably by failing to abide by the terms of the mortgage arrangement. What Plaintiff claims not to have been paid by the 1st Defendant is very minimal compared to what the Plaintiff owes the 1st Defendant. It would neither be equitable nor justified for the court to interfere with the exercise of the 1st Defendant’s statutory powers of sale.

There would be no justification for the court to direct the 1st Defendant on which remedy to employ as this is clearly the prerogative of the 1st Defendant under the terms of the mortgage agreement. The Plaintiff has miserably failed to establish his case. It is not surprising that rather than press for his prayers as pleaded in the plaint, plaintiff is now asking the court to allow him to negotiate with the 1st Defendant. I find that Plaintiff has failed to prove his case against both 1st and 2nd Defendants. Accordingly his suit is dismissed with costs to the 1st and 2nd Defendants.

Dated signed and delivered in Chambers this 12th day of January 2005

H. M. OKWENGU

JUDGE