



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 204 of 1999

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

VIRGINIA MILANOI PERTET.....1ST DEFENDANT

R U L I N G

The Plaintiff herein, **NATIONAL BANK OF KENYA LIMITED**, obtained default judgment against the Defendant, **VIRGINIA MILANOI PERTET**, for the sum of Kshs.2,425,364/90 together with interest thereon at 34% per annum from 27th April, 1999 until payment in full and costs of the suit. Decree was issued on 22nd September, 1999. Upon default by the Defendant in payment of the decretal sum as agreed in a consent order the Plaintiff applied a number of times for execution of decree against the Defendant, but without much success.

On 3rd June, 2002 a tripartite agreement was signed by the Plaintiff, the Defendant and one **CYRUS KHWA SHAKHALANGA JIRONGO** (hereinafter called Jirongo). They called it a deed of assignment of debt (hereinafter called the “deed”). By that deed the Defendant assigned to Jirongo the “book debt” that she owed the Plaintiff. That “book debt” was defined in clause 2 of the preamble of the deed as follows:-

“The Bank (the Plaintiff) on the application of the Assignor (the Defendant) advanced to the Assignor banking facilities by way of loan or overdraft and the Assignor having failed to service the facilities as agreed has become indebted to the Bank in the sum of (Kshs.5,644,168/20) as at 15th May, 2002 which sum continues to accrue interest at prevailing Bank rates (hereinafter called “book debt”).

The assignment itself was in the following terms as set out in clause 1 of the deed:-

“1. Assignment of Book debt

For non-monetary consideration as between the Assignor and the Transferee (Jirongo) but in consideration of the Bank agreeing to stop pursuit of the Assignor for the repayment of the entire book debt (but without prejudice to the Assignor’s liability for the repayment of the debt as stated in clauses 2 and 5 hereunder) and in further consideration of the Transferee agreeing to take over responsibility for the repayment of the full Bank debt and to pay the same to the Bank, the Bank hereby agrees to the assignment of the Book debt and the Assignor hereby assigns to the Transferee the full Book debt due and owing to the Bank together with all interest due and to become due under the same terms and conditions

existing between the Bank and the Assignor.”

There were various covenants. In clause 2(II) Jirongo undertook to take over and pay the full Book debt due and owing to the Plaintiff by the Defendant, “without any conditions, limitations or other considerations outside the ambit of the bank/customer relationship existing between the (Plaintiff) and the (Defendant), which relationship is hereby transferred as is to (Jirongo).”. In clause 2 (III) the Plaintiff reserved to itself alone the right to rescind the assignment and revert to recovery of the debt from the Defendant “in the event that the (Plaintiff) fails to recover the debt from (Jirongo).” This is reinforced by clause 5(II) which provides:-

“The Assignor and the Transferee further irrevocably reaffirm their understanding that should the Transferee fail to repay the book debt or part thereof, the Bank will have recourse on the Assignor for such repayment and will revive execution of the decree already held against the Assignor without any reference to the Transferee.”

And in clause 5(IV) it is provided:-

“Save as reserved by the Bank herein, neither party shall have the right to rescind this Assignment after execution.”

I will quote one more covenant. It is clause 2(IV). It provides:-

“The Transferee hereby submits and subjects himself to the jurisdiction and judgment of any court or other forum of arbitration handling recovery of this debt as between the Bank and the Assignor including execution of any decree issued in favour of the Bank against the Assignor.”

The record of the court shows that since execution of the deed on 3rd June, 2002 the Plaintiff has sought execution of the decree herein against the Defendant herself, apparently without much or any success. By chamber summons dated 28th July, 2004 the Plaintiff has sought an order to enjoin Jirongo in these proceedings. It also seeks the further orders that Jirongo is liable to satisfy the decree herein, that the Plaintiff be at liberty to execute the decree against Jirongo and that execution proceedings do issue against him. The application is said to be brought under sections 3A, 34 and 92 of the Civil Procedure Act (the Act) and Orders I, Rule 10(2) and XXI, Rule 12 of the Civil Procedure Rules, and all other (unstated) enabling provisions of the law. Among the grounds stated for the application is this one:-

“(d). That by a (deed of assignment) executed in favour of the Plaintiff, (Jirongo) bound himself, inter alia, to satisfy the (decree herein) and further did subject himself to execution proceedings in respect thereof.”

To the supporting affidavit sworn by one ALEXANDER AMANI BUSISA, the Manager of the Plaintiff’s Narok branch, are annexed the decree herein and the deed of assignment of debt, ***inter alia***.

Jirongo opposes the application. In a replying affidavit sworn on 14th October, 2004 he admits executing the deed of assignment of debt (paragraph 4). But he argues as follows. The purport and tenor of the said deed was that the Plaintiff was required to totally transfer the Defendant’s entire debt to him (Jirongo) and he was thereby to become the Plaintiff’s debtor for the payment of the entire book debt (paragraph 5). However, the Plaintiff reserved to itself the right to rescind the said deed if he (Jirongo) failed to pay the book debt and to thereafter revert to the Defendant for payment and settlement of the decree herein (paragraph 6). That after execution of the deed of assignment the Plaintiff immediately reneged on its terms by, inter alia, continuously pursuing the Defendant for settlement of the decree without reference to him (Jirongo) and by refusing and failing to recognize that he (Jirongo) was the assignee of the debt (paragraph 7(c) and (d)). That the Plaintiff by its said actions prevented the taking effect and actual performance of the terms of the deed of assignment (paragraph 8). And that therefore by its conduct the Plaintiff had exercised the right reserved to itself under clause 2(III) of the deed to rescind the assignment of the debt and had reverted to the defendant for recovery of the debt (paragraph 12). The Plaintiff is thus

estopped by its conduct from demanding payment from Jirongo under the deed (paragraph 13). Jirongo has also argued in his said affidavit that the deed of assignment was a document prepared by the Plaintiff's legal manager without any input by either himself (Jirongo) or the Defendant, and should therefore be strictly interpreted as against the Plaintiff (paragraph 16). Further, the deed of assignment was without any consideration to himself by either the Plaintiff or the Defendant, and the same is thereby null and void (paragraph 17).

In furtherance of the Plaintiff's position Mr. Ashitiva submitted that the Plaintiff had the right under the deed to elect against whom to proceed as between the Defendant and Jirongo, or even to proceed against both of them at the same time. Mr. Koyoko for Jirongo submitted along the arguments set out in detail in the replying affidavit. I have considered the submissions of learned counsels. I have also carefully read the deed of assignment of debt dated 3rd June, 2002.

The purport and intent of the deed of assignment appears to me to be clear. It was to relieve the Defendant of the burden of her indebtedness to the Plaintiff (the book debt, including the decretal sum in this suit) upon transfer of the same to Jirongo. No monetary consideration passed as between the Defendant and Jirongo. But by express exclusion of monetary consideration some other kind of consideration is strongly suggested as between the two. In any event, whatever other side arrangements there may have been between Jirongo and the Defendant they do not and cannot concern the Plaintiff. The Plaintiff's part of the bargain was that it would cease to pursue the Defendant for settlement of the book debt once the same was assigned to Jirongo. That was a substantial benefit to the Defendant and to Jirongo. Between him and the Defendant there must have been some kind of special relationship. To my mind there was consideration to Jirongo, and the deed of assignment cannot be null and void for failure of consideration. I so hold.

Upon execution of the deed of assignment by the three parties the Plaintiff was required to cease pursuit of the Defendant for payment of the book debt. This book debt included the decretal sum in this suit. The Defendant's burden under the book debt fell from her shoulders unto the shoulders of Jirongo (for whatever consideration between the two of them). After execution of the deed Jirongo replaced the Defendant as the Plaintiff's debtor for all purposes related to the book debt, including the decretal sum herein. Under the deed the Plaintiff was entitled to pursue Jirongo for settlement of the book debt (including the decretal sum). The Plaintiff was no longer entitled to pursue the Defendant while it pursued Jirongo. It was not entitled to pursue both of them at the same time. The Plaintiff reserved for itself in the deed of assignment the right to rescind the assignment and pursue the Defendant should Jirongo fail to pay the book debt. The court record shows clearly that since execution of the deed of assignment the Plaintiff has pursued the Defendant by execution proceedings herein for settlement of the decretal sum. This to my mind was an act of rescinding the deed of assignment on the part of the Plaintiff, and Jirongo is thereby no longer bound under the deed. I so hold. The Plaintiff must continue to pursue the Defendant for payment of the book debt (including the decretal sum herein), if it can.

In the circumstances I find no merit in the application. The same is hereby dismissed with costs to Jirongo. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MAY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 27TH DAY OF MAY, 2005.