



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE 33 OF 1997

PATRICK MUTURI 1ST PLAINTIFF

JEMIMAH MUTHONI 2ND PLAINTIFF

GREENLAND HOLIDAY RESORT 3RD PLAINTIFF

AND

KENYA COMMERCIAL BANK LTD DEFENDANT

CIVIL CASE NO. 53 OF 2001

BETWEEN

PATRICK MUTURI PLAINTIFF

AND

KENYA COMMERCIAL BANK LTD DEFENDANT

(CONSOLIDATED)

JUDGMENT OF THE COURT

By their amended plaint which was filed in court on 22.4.1997, the plaintiffs in civil case No. 33 of 1997 sued the defendant praying for:-

(a) Declaration that:-

(i) The plaintiffs are not indebted to the defendant in respect of any loan.

(ii) The intended sale is illegal.

(b) (A) declaration that land parcels NTIMA/IGOKI/3442 and NYAKI/KITHOKA/284 title deeds are unlawfully held by the defendant and should return them to the plaintiffs.

(b) Alternatively accounts be taken to ascertain whether there is any outstanding loan if at all.

(c) Costs and interest.

The basis for the plaintiffs' claim against the defendant can be extracted from paragraphs 6A and 6B of the amended plaint in which the plaintiffs aver as follows:-

“6A. The 1st plaintiff sometimes in 1989 to 1991 or thereabouts got 3 loan facilities from the defendant secured as hereunder:-

- Kshs. 50,000/= by NTIMA/IGOKI/3442
- Kshs. 450,000/= and 2.1 million by NYAKI/KATHOKA/284, the charges executed for the same were to attract interest at 18½% maximum and not alterable without 1st plaintiff's consent.

“6B. The aforesaid loans were repaid in full as confirmed by defendant on 10.8.95. However on 13.3.97, without notice and or following the procedure, the defendant advertised for sale NYAKI/KITHOKA/284 and NTIMA/IGOKI/3442 purporting to exercise statutory power of sale which the plaintiffs aver is unlawful as there is no loan subsequently advanced to any of the plaintiffs on same securities or at all.”

At paragraph 8 of the amended plaint, the plaintiffs aver that the defendant never supplied the 1st plaintiff or any of them with statements of accounts in respect of the allegedly owed amounts.

Paragraph 4A of the amended plaint is also relevant and in it the plaintiffs aver as follows:-

“4A. The 1st plaintiff is registered as proprietor of land parcel No. NYAKI/KITHOKA/284 but in trust for the 2nd and 3rd plaintiff's having allowed the same to develop the same with hotel facilities worth over 50 million shillings.”

The defendant filed its amended defence and counterclaim on 29.4.1997, in which it denied all the plaintiff's allegations and in particular that title number NYAKI/KITHOKA/284 was registered in the 1st plaintiff's name in trust for the 2nd and 3rd plaintiffs. The defendant averred at paragraph 7 of the amended defence and counterclaim that the advertisement for sale of NTIMA/KITHOKA/284 and NTIMA/IGOKI/3442 was proper and in pursuance of the charge by the 1st plaintiff and the defendant and which charge was not discharged by the 1st plaintiff. Paragraphs 8 and 10 of the defendant's amended defence are critical to the defendant's case and read as follows:-

“8. The defendant admits the 1st plaintiff got various loans from 1989 to 1992 but denies the interest was fixed. It indeed avers that the bank has always reserved its right to charge interest in its sole discretion a fact known, explained and accepted by the 1st plaintiff.”

And paragraph 10 reads thus:-

“10. The defendant in reply to paragraphs 7 and 8 of the plaint states that the requisite demand notice was personally delivered to the 1st plaintiff further that he has on several occasions been made aware of all outstanding balances on all its accounts.”

On the counterclaim the defendant was demanding Kshs. 10,826,600/= in respect of facilities outstanding on the 1st plaintiff's various accounts with the defendant namely accounts No. 281933975 and 281689036 in the 1st plaintiff's name and account number 2811601629 in the name of the 3rd plaintiff, Greenland Holiday Resort. In addition to the Kshs. 10,826,600/= the defendant also claimed all accruing interest at bank rates until payment in full. The defendant also asked for costs of the suit and costs of the counterclaim plus interest at court rates.

In civil case No. 53 of 2001, Patrick Muturi (hereinafter referred to as the plaintiff) was the only

plaintiff. He sued the defendant for the following reliefs:-

(a) A declaration that the plaintiff is not indebted or liable to pay to the 1st defendant the alleged loan or at all AND THAT the 1st defendant has no contractual or legal right to realize the security over land title No. NYAKI/KITHOKA/284.

(b) Orders to take accounts and to order the 1st defendant to pay to the plaintiff moneys to which he is rightfully entitled.

(B1) A declaration that the auction sale of 22.3.2001 of the said title

is null and void and of no legal effect.

(B2) An order to rectify the register respecting the above title to cancel the name of the 3rd defendant therefrom.

(c) General damages

(d) Other further or alternative relief as may be just and expedient.

(e) Interest on (B) above

(f) Costs of this suit.

The plaintiff stated that he was the registered proprietor of title No. NYAKI/KITHOKA/284, which he gave as security to the 1st defendant for a loan of Kshs. 450,000/=. The plaintiff averred further that in 1991 he made a further charge in favour of the defendant to secure a loan of Kshs. 2,100,000/= which amount plaintiff alleged was never credited to his account, though he repaid it. According to the plaintiff, the plaintiff held the following accounts with the defendant.

(a) Current account No. 281689936 in the plaintiff's name.

(b) Current account No. 281601629 in the name of Greenland Holiday Resort; and

(c) Loan account No. 281933975 – Comm. A/c No. 2 in the name of the plaintiff.

The plaintiff also stated that the defendant credited the plaintiff's account with the sum of Kshs. 1,200,000/= without the plaintiff's request and without the plaintiff furnishing security for the same. The plaintiff contended that the defendant manipulated his accounts with the defendant and especially account number 281933975 which resulted in unlawful debits being levied against the account and charging of irregular interests which were illegally debited against the plaintiff's account. The plaintiff accused the defendant of unlawfully realizing the securities by public auction without any prior public advertisement and without indication of a reserve price and finally that in fact no public auction was held.

In its defence dated 12.4.2001 filed in court on the 17.4.2001 the defendant contended that the plaintiff received all the amounts on the various loans, utilized the amounts but refused to pay back. The defendant also averred that when the plaintiff failed to pay back the moneys, he was duly notified of the default but he chose to ignore the notices and as a result thereof, the defendant instructed auctioneers to sell the plaintiff's property.

The defendant also averred in its statement of defence that this case was res judicata civil case No. 33 of 1997 which suit was adjudicated upon right through to the Court of Appeal. At all stages, the plaintiff lost the battle.

In its defence to amended plaint filed in court on 30.1.2002, the defendant reiterated the averments as per

its defence dated 12.4.2001 and in addition averred that the public auction at which the plaintiff's securities were sold was properly advertised and conducted and further that the defendant had the legal right to exercise its statutory power of sale after the plaintiff failed to repay the loans advanced to him by the defendant.

On the basis of what I have outlined above, the plaintiff prays for judgment against the defendant, and on that basis the defendant prays that the plaintiff's suit against it be dismissed with costs. Before moving on to determine whether or not the plaintiff has proved his case against the defendant on a balance of probabilities, it is necessary to frame the issues that are for determination in this case. No such issues appear to have been framed and/or agreed between the parties. From the pleadings, the following are what I consider to be the issues for my determination:-

1. Whether indeed the plaintiff took any loans from the defendant and if so, how many loans were taken?
2. If the loans were taken, whether the same were duly secured, and if they were secured what securities did the plaintiff give?
3. If the securities were given, were the charge documents duly executed between the plaintiff and the defendant or was the plaintiff's signature forged on these documents?
4. Were the loans, if taken, fully repaid by the plaintiff, and if so, when were the repayments made and from which account?
5. Was the public auction conducted on behalf of the defendant lawfully and regularly done, and if not, was the same null and void?
6. Who is to bear the costs of this suit?

After carefully considering the pleadings and the evidence and also after carefully considering the submissions made by both parties in this case, it is not in dispute that the plaintiff got three loans from the defendant. In case No. 53 of 2001, the plaintiff himself states that he received three loans from the defendant being Kshs. 50,000/=, 450,000/= and 2.1 million shillings respectively. According to that plaint, the plaintiff secured the loan of Kshs. 450,000/= by a charge over title number NYAKI/KITHOKA/284. The charge was duly executed by the plaintiff on 7.8.1989 and registered on 21.8.1989. A copy of the charge appeared at pages 243 to 257 of the defendant's list of documents complete with the certificate of official search, letter of consent to charge LR NYAKI/KITHOKA/284.

It is also not in dispute that the plaintiff took an earlier loan for Kshs. 50,000/= and secured the same with a charge over title No. NTIMA/IGOKI/3442. The charge was executed by the plaintiff on 29.3.1988. A copy of that charge appeared at pages 223 – 232 of the defendant's list of documents. Also as part of this charge, there was a certificate of official search at page 233 and application for registration of the charge at page 234.

The plaintiff also admitted by his plaint in case No. 53 of 2001 that in 1991, he made a further charge in favour of the defendant to secure a loan of Kshs. 2,100,000/=. Though the plaintiff contends that this amount was never credited to his account, he nevertheless admitted executing the charge on the 29.12.1990. A copy of the further charge appeared at pages 278 – 280 of the defendant's list of documents. The same was registered on 7.1.1991. The plaintiff also executed a guarantee on the 2.2.1995 for the monies that were advanced for use by the plaintiff's hotel operating under the style and name of Greenland Holiday Resort.

From the above therefore, it appears clear to me that there is no dispute as to the taking of the various loans by the plaintiff and providing security for the same. The plaintiff alleged in his evidence, and as he cross-examined the only witness called by the defendant, one PAUL MWAURA MUIGAI, that the signature on these documents purported to be his was forged. I have considered these allegations vis-à-

vis the pleadings and the entire evidence adduced before me, and find that those allegations are without merit. In any event, the plaintiff did not adduce any evidence by a handwriting expert to prove his allegations that his signature was forged. The first and second issues are therefore concluded in the affirmative.

The plaintiff contended that the sum of Kshs. 1.2 million which the defendant claims was a loan was not a loan. According to the plaintiff, this amount was, in the plaintiff's own words "removed from one of his accounts" and placed in another of his accounts on the pretext that the amount was a loan. The plaintiff alleged in the same breath that the amount was paid into his account by a friend.

The defendant's case regarding the 1.2 million facility which the plaintiff contends was not a loan is that the overdraft facility offered to the plaintiff on 19.5.1988 in the sum of Kshs. 50,000/= was later enhanced to Kshs. 500,000/= and in 1991, the plaintiff was granted an additional loan of Kshs. 331,000/=, yet again in 1992, the plaintiff took the Kshs. 1.2 million loan through the defendant's letter of offer dated 4.5.1992 which the plaintiff accepted on 7.5.1992. The letter of offer appeared at pages 261 – 263 of the defendant's list of documents. It was also the defence case that this amount was credited to the plaintiff's account number 281689963 on 11.5.1992. A loan account being number 281950386 was later opened but as the plaintiff was allegedly not making any repayments, the account was later classified as a bad debt. The defendant explained further that the security for this Kshs. 1.2 loan was the charge for Kshs. 50,000/= over NTIMA/IGOKI/3442 and the further charge over NYAKI/KITHOKA/284.

Against the above evidence, the plaintiff claimed that the sum of Kshs. 1.2 was credited to his account by a friend. I find that apart from making the allegation, the plaintiff adduced no evidence to prove the fact of a friend depositing the money into his account, such as banking slips, etc. I find that I have no reason to doubt the evidence offered by the defendant in its defence. The plaintiff's assertions are empty allegations that are not supported by evidence. In effect therefore I find that every loan facility that the defendant says was offered to the plaintiff was indeed offered, accepted and utilized by the plaintiff.

Were the loans fully repaid to the defendant as alleged by the plaintiff? The plaintiff alleged in respect of the Kshs. 2.1 million loan that though the same was never credited to his account the same was nevertheless fully paid by the plaintiff. The defendant's case is that the plaintiff never repaid the amounts, thereby forcing the defendant to notify the plaintiff of his default. It is also the defendant's case that the plaintiff's accounts were not being run effectively and that even when the plaintiff was called upon to rectify the anomaly the plaintiff ignored the same. From the record of the list of documents, the plaintiff was issued with a notice dated 9.4.96 demanding payment of Kshs. 6,333,111/= within FOURTEEN DAYS failing which the plaintiff's securities would be sold by public auction. In that same letter, the plaintiff was warned that no further reminders would be sent to him. It would appear to me that the plaintiff did not respond to the said letter and by a further letter dated 5.8.1996, the defendant through its advocates M/S Kagonda & Mukinya advocates issued the statutory three month notice to the plaintiff warning him that if he did not settle the then outstanding sum of Kshs. 7,416,011.20 within three months from the date of that letter, the defendant would proceed to realize the charge of titles No. NTIMA/IGOKI/3442 and NYAKI/KITHOKA/284 in accordance with the provisions of section 74 of the Registered Land Act (hereinafter referred to as the Act).

Section 74 of the Act provides for the chargee's remedies against the chargor in case of default on the part of the latter in repaying advances made to the chargor by the chargee. The chargee is required to serve a notice on the chargor to repay the money owing. Subsection 2 thereof provides thus:-

"2. If the chargor does not comply within three months of the date of service, with a notice served on him under subsection (1), the chargee may –

- (a) Appoint a receiver of the income of the charged property, or,**
- (b) Sell the charged property.**

My reading of all the circumstances surrounding the plaintiff's relationship with the defendant, and from

the evidence on record before me, is that the plaintiff did not repay the loans that he admits he received from the defendant. That was, in my view, the reason for the issuance of the various notices issued to the plaintiff.

The plaintiff made one interesting statement to the effect that though the loan of Kshs. 2.1 million was never credited to his account, he nevertheless repaid the same. Common sense dictates against such an action by a businessman of the plaintiff's stature. Furthermore, the plaintiff's contention that he repaid the loans is not supported by any evidence. All the bank statements produced by the defendant, and which statements were not disputed by the plaintiff show ever increasing debit balances, spiced by one or two credits here and there.

That brings me to the next question and that is whether the public auction was properly conducted. The defendant contends that after the plaintiff failed to repay the moneys, he was issued with requisite notices, both statutory and otherwise to pay up the amount and that it was only after the plaintiff failed to comply with the notices that the public auction was eventually conducted. I am satisfied that the plaintiff failed and/or refused to comply with the notices issued to him by the defendant. I do find therefore that having duly executed the charges over NTIMA/IGOKI/3442 and NYAKI/KITHOKA/284 the plaintiff was duty bound to comply with the terms of the charges which included realization of the charged securities by public auction in case of default. From the bundle of documents relied upon by the defendant the sale by public auction was advertised in the Standard newspaper. Further the notification of sale was served upon the plaintiff Patrick Muturi on 18.1.2001 and Patrick Muturi signed for the same. The notification of sale gave details of the charged properties and their respective values. The notification also gave the date when the public auction would be held namely 22.3.2001. I therefore have no doubt in my mind that all that was required of the defendant before carrying out the public auction was done. The plaintiff has therefore no reason to complain that the sale was conducted in an irregular and or wrongful manner.

The plaintiff also complained that the defendant raised too many unexplained debit balances against his various accounts. In the plaintiff's view, these debits were a clear indication of the defendant's agents' manipulation of the plaintiff's accounts which led to massive thefts and frauds of the plaintiff's moneys. The defendant explained and I think I am persuaded by those explanations that the miscellaneous debits and commissions are charges that were levied by the defendant in charges for bounced cheques or unpaid standing orders when there was no cash in the plaintiff's accounts for the monthly loan repayments. The defendant also explained that other debits were for insurance premiums in respect of the charged properties. I have accepted as true and correct, these explanations by the defendant. For example, the defendant's letter to the plaintiff dated 4.5.1992 set out in very clear terms the conditions upon which the defendant was making advances to the plaintiff. That letter also provided, inter alia, that:-

“The bank reserves the right to set off or combine all or any accounts of the borrower in their own right whatever their nature. The right to consolidate all securities held on any account as security for all liabilities is also reserved.”

The plaintiff confirmed his acceptance of those terms and conditions of offer by appending his signature to a copy thereof on 7.5.1992. That letter of offer, among others was the basis of the charges that were subsequently duly executed by the plaintiff.

In questioning the defendant's right to consolidate the charges, the plaintiff relied on the provisions of section 84 of the Act. The section provides as follows:-

“A chargee has no right to consolidate his charge with any other charge unless the right is expressly reserved in the charges or in one of them and is noted in the register against all the charges so consolidated.”

Clause 8 of the duly registered and stamped charge dated 29.3.1988 over NTIMA/IGOKI/3442 provided as follows:-

“(a) Section 84 of the said Act (restricting the right of consolidation) shall not apply to this charge

and the bank hereby reserves and the chargor hereby confirm the bank's right to consolidation."

(c) Without prejudice to any equitable right of consolidation it is hereby declared that no property of the chargor which at the date hereof is subject to mortgage or charge in favour of or vested in the bank shall be redeemed except on payment not only of all moneys secured thereby but also of all moneys hereby secured."

It is my considered view that the plaintiff has no reason to complain in the face of these express provisions in the charge he duly executed in favour of the defendant. The charge was also duly registered. That right to consolidate was noted in the register. The certificate of official search dated 22.4.1997 on NTIMA/IGOKI/3442, which document appeared at page 267 of the defendant's bundle of documents clearly bore these details.

The plaintiff's complaint that the charges may not have been stamped is not sustainable by the evidence on record and I accordingly dismiss the same since they lack merit.

The plaintiff also complained that the interest charged was too high or that the rate of interest was changed by the defendant without notice to the plaintiff. In the further charge over NYAKI/KITHOKA/284 in respect of Kshs. 2.1 million dated 29.12.1990 interest was provided as being:-

"SUBJECT to a maximum of eighteen decimal five (18.5%) per centum per annum and the lender shall need not inform the chargor of any change in the rate of interest so payable."

In summary, the plaintiff has not proved any of his claims against the defendant on a balance of probabilities. I accordingly dismiss the suit with costs to the defendant.

The defendant had counterclaimed against the plaintiff in the sum of Kshs. 10,826,600/= in respect of facilities outstanding on the plaintiff's various accounts with the defendant. During the hearing however, the defendant stated that it did not wish to pursue the claim since the amount so counterclaimed had been written off. The defendant's counterclaim is accordingly dismissed with costs to the plaintiff.

Orders accordingly.

Dated and delivered at Meru this 19th day of October 2005.

RUTH N. SITATI

JUDGE

19.10.2005