



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 299 OF 1998

SAVINGS & LOAN KENYA LTD.....PLAINTIFF

VERSUS

PHILIP MUTUA KITHI.....DEFENDANT

JUDGMENT

The Plaintiff bank filed this suit against the defendant for the recovery of shs 832,141.75 together with interest at 26% being the balance unpaid following a loan transaction entered into between the bank and its customer, the Defendant.

In June 1991, the defendant entered into a loan transaction to borrow shs 855,000 from the Plaintiff against the security of his property known as Ngong/Ngong/9064, which was charged in favour of the Plaintiff.

Evidence before the court shows that the actual draw down, or the amount actually advanced, was shs 300,000 only, the rest never having been advanced because, apparently, the Defendant did not keep up his part of the bargain.

The Defendant never repaid any part of the sum advanced, despite demand made on several occasions. In his testimony before this court, the Defendant stated that he had no money to repay, and left it to the Bank to do what it wanted. He was confident that the Bank would fetch more than the shs 300,000 advanced to him. He admitted that in 1996 he received a notification of the sale of his property and again did nothing. What he forgot, obviously, was that the interest on the loan was accumulating fast, and that it wasn't simply a matter of selling the property for "more than shs 300,000" that would solve his problem.

In August, 1996, the Plaintiff obtained a valuation of the property from a firm of professional valuers, M/S Ebony Estates Ltd. They provided a "forced sale" valuation of shs 790,000. Eventually, in March, 1997 the property was auctioned for shs 720,000/= to the highest bidder in a public auction. By then, not surprisingly, the original debt of shs 300,000 had gone up to something like shs 1.6 million. Having credited the Defendant's account with shs 720,000/= the Plaintiff embarked on the recovery of the balance, shs 832,141.75/=, the amount pleaded in the plaint.

By a defence filed on May 14, 1998 the Defendant claimed that the Plaintiff auctioned his property at a gross under value, and that the sale was not bona fide. He counterclaimed for general damages against the Plaintiff. He obtained his own valuation of the property from a registered valuer, Mr. P.A Matumbi, who also appeared as his witness, and stated that in his opinion the property was worth shs 1.65 million as

of November, 1997. Mr. Matumbi admitted that his valuation was based on “market value” and not “forced sale value”; that there is a difference between selling a property in an auction, and to a willing buyer in an ideal market condition.

The Defendant’s case was that he owes the Bank nothing because it sold his property at throw away price, and he has counter-claimed for general damages against the Bank. The issue before the Court is whether the Bank acted improperly and irregularly in selling the Defendant’s property at “a throw-away price” in disregard of its statutory and equitable duty to its customer, the Defendant.

Having heard all the evidence before the Court, I am satisfied, on a balance of probability, that the Plaintiff did not act improperly or irregularly in selling the defendant’s property, and that it acted bona fide, keeping the interests of the Defendant as best as it could in the circumstances.

Evidence shows that the Plaintiff obtained a professional valuation of the property before the sale; that it established a reserve price; that it sold to the highest bidder at the auction; and that it had made every effort before sale to plead with the Defendant to settle the debt. The Bank had even declined to accept offers in the past which were below its reserve price.

This is as best as it could do. The duty of care owed by a bank to its customer is set out in *Mbuthia v Jimba Credit* (1988) KLR1 where the Court of Appeal quoted from the English case of *Standard Chartered Bank v Walker* (1982) 3 A.E.R 938 as follows:

“So far as mortgagees are concerned the law is set out in *Cuckmere Brick Co. Ltd. Vs Mutual Finance Ltd* [1972] 2 ALL E.R. 633 [1971] Ch. 939. If a mortgagee enters into possession and realizes a mortgaged property it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time he must exercise a reasonable degree of care”

In the *Cuckmere* case the head note of the Court of Appeal decision reads as follows:

mortgagee was not a trustee of the power of sale for the mortgagor and, where there was a conflict of interest, he was entitled to give preference to his own over those of the Mortgagor, in particular in deciding on the timing of the sale; in exercising the power of sale, however, the Mortgagee was not merely under a duty to act in good faith i.e honestly and without reckless disregard for the mortgagor’s interest, but also take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it”.

I am satisfied that in the case before me the Plaintiff acted reasonably, and in good faith, in dealing with the sale of the Defendant’s property. Much though I sympathize with the Defendant that his original loan of shs 300,000 escalated to shs 1.6 million (and still keeps mounting) I must say that he is the author of his own problems. He represents the classic case of a borrower who, having got the money, goes to slumber, thinking that no interest is payable. He clearly admitted in court that he took no interest in repayment of the loan, just left it to the Bank to do what it wanted, and did not even attend the auction. He has certainly not proved his counterclaim, and the same is dismissed with costs.

In the result, I enter Judgment for the Plaintiff for shs 832,141.75 together with interest, and costs as prayed in the Plaintiff.

Dated and Delivered at Nairobi this 29th day of April, 2004.

ALNASHIR VISRAM

JUDGE