



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 199 OF 2003

ASAPH GATHUNGU MUTI PLAINTIFF

VERSUS

KENYA FINANCE CORPORAION & ANOTHER PLAINTIFF

RULING

This is an application to strike out the Plaintiff’s suit. The application is brought pursuant to the provisions of Order VI rule 13 (1) (b) and (d) of the Civil Procedure Rules, which reads as follows;

“At any stage of the proceedings the court may order to be struck out or amended any leading o the ground that –

- (a)
- (b) It is scandalous, frivolous or vexatious; or
- (c)
- (d) It is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

The application is supported by the affidavit of Mr. B.K. Mitei, the Liquidation Agent of the 1st Defendant, (hereinafter cited as the applicant).

By his affidavit, Mr. Mitei sets out the following facts, which were also relied upon extensively by Mr. Bundotich, advocate of the applicant.

- (i) The Plaintiff was given a loan of Kshs 320,000/- in 1987. The loan was given by the applicant.
- (ii) As security for the loan, the Plaintiff charged two (2) properties, Title Numbers

KABETE/KABETE/887 and

KABETE/KABETE/889.

(iii) The Plaintiff defaulted in his loan repayments. After several attempts to realize the security comprised in KABETE/KABETE/887, it was finally sold by public auction, to the 2nd Defendant, on 22/8/01. The purchase price was Kshs 700,000/-

(iv) After the sale, the Plaintiff wrote to the Liquidator of the 1st Defendant, requesting that the balance still outstanding be written-off, as the Plaintiff was financially incapacitated.

(v) The Liquidator agreed to write –off the balance. In order to achieve the process of the write-off, the Liquidator sought and obtained court sanction.

(vi) The 1st Defendant wrote-off the balance and thereafter discharged the title No. KABETE'KABETE/889, and released the said title to the Plaintiff.

(vii) Subsequently, the Plaintiff instituted this suit, challenging the sale of L.R. KABETE/KABETE/887.

Given the scenario set out in paragraphs (i) to (vii) above the applicant contends that the Plaintiff cannot be allowed to prosecute this suit. The applicant says that the Plaintiff did unequivocally acknowledge the auction sale, without alleging any impropriety on the part of the Defendants. Thereafter, the conduct of the Plaintiff was akin to those of someone who had accepted the sale, and who was only seeking reprieve from further action that could otherwise be undertaken by the 1st Defendant, to recover the balance of the debt that was still outstanding.

Furthermore, the applicant acted on the Plaintiff's acknowledgement of the auction sale, and in response to his request, the 1st Defendant wrote-off the balance of the loan, (with the court's sanction), and discharged the 2nd security. In these circumstances, the applicant submits that the Plaintiff is estopped by law from raising any issues regarding the validity or otherwise of the sale of KABETE/KABETE/887. It is said that if the Plaintiff was allowed to prosecute this suit, the 1st defendant would be greatly prejudiced, as they had previously discharged the 2nd security, to their detriment.

The applicant has submitted that it wrote-off the balance of the debt, and discharged the 2nd security on the understanding that the Plaintiff had waived any claims and/or rights in relation to the suit property. In effect, the court is being asked to bar the Plaintiff from proceeding with this case, by striking it out, on the basis of equitable estoppel. In response to the application, the Plaintiff has submitted that estoppel has no application in this case. His argument is that the wording of the letter dated 8th January 2002 could not found estoppel as alleged or at all. At this juncture, I consider it necessary to set out the terms of that letter;

Asaph Gathungu Muti P.O. Box 60817 Nairobi 8th January 2002 The Director Deposit Protection Fund Central Bank of Kenya Thro”

The Liquidation Agent Kenya Finance Bank (In-liquidation) Central Bank of Kenya Nairobi

Dear Sir,

RE: OUTSTANDING DEBT: KENYA FINANCE BANK LTD. (IN LIQUIDATION)

I wish to address you on the above matter as follows:- I was granted a loan of Shs 330,000/- by Kenya Finance Corporation Ltd. in July 1987 to assist me rear chicken. My business of chicken rearing however collapsed due to various adverse factors ranging from high prices of feed, poor market and theft.

Being a subsistence farmer with no other income, I have over the years strived to pay to the bank whatever little I could afford. I have so far managed to pay over Ksh 105,000/-. The bank sold my property securing the debt L.R. NO Kabete/Kabete/887 in August 2001 realising a total amount of Shs. 700,000/-. I am an old man aged 78 years and not engaged in any economic activity from which I could raise income to service the debt. I also have no further property which I could sell to raise further funds as the only property left is the plot where I live with my family. I have absolutely no other source of income

and sale of my home would condemn me and my family to destitution. Given my present circumstances as outlined above, and the fact that the bank has fully recovered the original principal amount of Shs 330,000/- and a portion of interest from the amount already received I wish to humbly plead with the bank to waive the outstanding debt on this account which is comprised wholly of interest. I look forward to your kind consideration of my request. Yours faithfully, ASAPH GATHUNGU MUTI

The salient portions of that letter, for the purposes of the application before me are paragraphs 4, 5, 6 and 7. In paragraph 4, the Plaintiff acknowledges the fact that the applicant sold L.R. Kabete/Kabete/887 in August 2001, for Kshs 700,000/-.

The Plaintiff then explains in paragraphs 5 and 6, that he is unable to engage in any economic activity from which he could raise income to service the debt. He therefore requested the applicant not to sell the only other property, as that would condemn him and his family to destitution. And finally, at paragraph 7 of the letter, the Plaintiff pleads humbly with the applicant to waive the outstanding debt on his account.

From my reading of the letter, I understand the Plaintiff to have acknowledged that after the applicant recovered Shs 700,000/- from the sale of LR. Kabete/Kabete/887, the Plaintiff's account still reflected an outstanding debt. He pleaded with the applicant to write-off the balance of the debt, so as to save him and his family from destitution.

After due consideration, the applicant wrote to the Plaintiff on 21st March 2002, notifying him that the applicant had decided to write-off the loan balance. Thereafter, the balance was written-off after the court gave its sanction. However, the Plaintiff submits that the letter of 8/1/02 cannot be read in isolation. He says that the letter must be read within the circumstances then prevailing, and in particular as espoused in the letter dated 24.8.01. The relevant part of that letter reads as follows:

"I am in receipt of Notification of Sale of my above property, dated 26th June 2001 from M/s Forefront Agencies, but regret to note that you had not served me with the mandatory 90 days statutory notice".

It is contended that that letter, which was written 4 days before the sale, proves that the Plaintiff had at all material times raised issues against the sale. The Plaintiff submits that he was not attacking the right of the applicant to sell the charged property. He was attacking the method applied by the applicant in selling the suit property. He says that insofar as the letter dated 8/1/02 did not comment on the propriety of the sale, the Plaintiff cannot be estopped from challenging the propriety of the sale, by this suit.

The Plaintiff then went on to illustrate the fact the Plaintiff raised several triable issues, which he ought to be allowed to canvass before the court. Examples of such triable issues are; (a) Failure to serve a statutory notice on the Plaintiff

(b) Irregularity in the Notice

(c) Bad faith on the part of the chargee, when it switched the date of sale

(d) Failure to give Notice to the D.C, contrary to section 77 (6) of the Registered Land Act (Cap 300).

(e) Sale at an under-value. When the applicant was called upon to reply to the Plaintiff's submissions, they categorically stated that the application before the court should not be concerned with the question as to whether or not the Plaintiff discloses triable issues. The court was invited to limit its consideration to the issue of the doctrine of estoppel only, and to decline to inquire into the substantive matters raised in the Plaintiff.

It is my considered view that if the question to be considered was regarding whether or not the Plaintiff raised any triable issues, the Plaintiff would be correct. On the face of it, the Plaintiff does raise several important questions of law and fact. Therefore had I been dealing with an application for summary judgment, I would most certainly have declined to grant judgment summarily. But in this case, the applicant has invoked the doctrine of estoppel. In other words, the applicant is stating that whether or not

the Plaintiff raises some triable issues, the Plaintiff ought not to be allowed to prosecute the suit.

In The English & Empire Digest Vol. 21, page 288, is to be found a useful commentary on estoppel. It reads as follows; "If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in that way, in the belief of such a state of facts, to the damage of him who so believes & acts, the first is estopped from denying the existence of such a state of facts".

The same said commentary goes on to cite another example of the manner in which estoppel operates. It puts it in the following words;

"If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act upon it in a particular way to his damage, the first is estopped from denying that the facts were as represented".

Applying the foregoing principles to the case before me, I hold as follows; that the Plaintiff did make some written representations to the applicant, by the letter dated 8/1/02. I also hold that the Plaintiff intended that the applicant should act upon the said representations in a particular way. I understand the Plaintiff to have intended to relay a message to the applicant, that he was well aware that the suit property had been sold. Through the said sale the applicant had recovered Shs 700,000/-, but that still left an outstanding balance, which he was pleading should be written-off. To my mind, if the Plaintiff was pleading for the write-off of the balance only, it implied that he had accepted the finality of the auction sale, which gave rise to the sum of Kshs 700,000/- that had been credited to his account. I cannot comprehend how the Plaintiff can be seeking to challenge the very sale which resulted in his account being credited with the purchase price. If he had intended to challenge the sale, there would have been nothing simpler than his filing a suit to do so, outright.

I also accept the applicant's contention that they relied upon the Plaintiff's representation aforesaid, and then took action to write-off the balance of the loan, and thereafter discharged the remaining security. Having taken these actions, the Plaintiff's loan account no longer has any debits, as the same had been written-off. The applicant would thus be precluded from lodging a counter-claim in this suit for any outstanding loan, as the records would not be reflecting any outstanding balances. Similarly, following the discharge of the 2nd security, and the release of the title documents to the Plaintiff, the applicant lost its entitlement to realize the said 2nd security.

The sum total of these steps undertaken by the applicant is that the applicant has become extremely prejudiced. I therefore hold that it would be completely iniquitous to permit the Plaintiff to prosecute the suit herein. The only recourse that commends itself to me, as being just and equitable in this case is to uphold the doctrine of estoppel against the Plaintiff. Consequently, I grant orders in accordance with prayer 1 of the chamber summons dated 22nd October 2003. The suit herein is therefore struck out with costs. Dated at Nairobi this 10th day of March 2004.

FRED A. OCHIENG

Ag. JUDGE