REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 881 OF 1991

KENNETH R. MWANGI..... PLAINTIFF

-VERSUS-

PIONEER GENERAL ASSURANCE..... DEFENDANT

JUDGEMENT

By this suit dated 20th February, 1991, the plaintiff, abusinessman, prays for an injunction and an order that he has fullyrepaid a loan advanced to him by the defendant, an insurancecompany. The defendant however contends that the plaintiff stillowes it some money.

In his amended plaint filed with the leave of the court on 16thMay, 1991, the plaintiff alleges that at all material times he was theregistered owner of a plot known as L.R. No. 36/1/947, Nairobi onwhich there is a residential building. By a charge executed by theplaintiff in favour of the defendant on the suit premises, the defendanthad agreed to lend to the plaintiff the sum of Shs. 165,000/- repayableby monthly installments of shs.5, 301.25 inclusive of capital, insuranceand interest with effect from 5th June, 1979 and that the charge,which was to act as security, for the amount borrowed, was subject tothe provisions of the Registered Land Act, Cap.300 of the Laws ofKenya. In pursuance to the terms of the charge, he commencedmaking payment as therein stated in 1979 through a Banker's Orderof Shs.5, 301.25 in favour of the defendant. In breach of the termsthereof, the defendant did not advance the sum of shs. 165,000/- asagreed. The defendant also, in breach of the terms of S.74(1) of theRegistered Land Act, failed to notify the plaintiff of the breach beforeattempting to sell off the suit premises nor had they ever notified himof any breach or failure to pay any of the installments and had nowadvertised the suit premises for sale allegedly in exercise of themortgagee's powers of sale. He also contended that the defendanthad not accounted for shs.150, 000/- due to him under an endowmentpolicy entered into at the time he was negotiating the loan from the defendant.

Consequently, the defendant should be restrained from selling thesuit premises and be required to produce accounts. Plaintiff alsoprayed for a declaration that the loan had been fully paid and that theproceeds of the Life Policy should be paid to him plus generaldamages and costs of the suit. On its part the defendant contendedthat the charge was for Shs. 165,000/-; it was under the Transfer of Property Act, 1882 and not the Registered Land Act and that thedefault of payment was not denied and the plaintiff had admitted byan affidavit receipt of the demand notice. It also contended that theplaintiff had made only 1 payment towards the endowment policy andhas since lapsed. Consequently, the suit should be dismissed Nocounter-claim was pleaded by the defendant.The parties testified in support of their respective cases. The plaintifftestified that he had dealings with the defendant before the currentmatter. He had in 1972 been granted a loan by the defendant whichhe had successfully paid. In 1979, he needed some funds

toconstruct a house on plot No.36/1/947, Eastleigh registered in hisname. As he was known to the defendant, he approached it for a loanof shs. 165,000/- to be secured by a charge on the said property.After the defendant had agreed to make the loan to him, he chargedthe plot to the defendant and signed a loan agreement which was tobe repaid by monthly installments of shs.4, 000/- per month for 48months at an interest of 12% per annum. As it was a loan forconstruction, its various amounts was to be paid as when certificateswere produced.

After the construction work had started, the first installment of themoney was paid to the contractor on his behalf on the production ofthe first certificate by the contractor on certification of the architect.After the first payment, no further payment was made either to him orthe contractor by the defendant. According to him, no payment couldbe made by the defendant to his contractor or himself without acertificate. Although the second certificate was for Shs.56,000/-, thisamount was not paid to him or his contractor as a dispute arosebetween him and the defendant as the defendant had decided thatpayments toward the certificates be by voucher, which he did notagree with. In the end the amount paid to him and his contractor wasless than the amount for the first certificate. Without resolving thedispute on the 1st and 2nd certificate, the defendant also caused athird certificate to be made showing that he had receivedShs.115,000/- and that he was receiving Shs.25,000/- for thirdcertificate. He denied having received the payments shown in thesecond certificate and was not paid on the third certificate and wasunable to complete the construction work and no completioncertificate had been issued by the contractor. As a result of the non-payment, he wrote complaining to the defendant on 9th August, 1979 and 12th June, 1980. In the letter of 9th August he particularlycomplained that he had not received any part of the third certificatewhile the letter of 12th June, 1980 cancelled policies and furtherpayments and calling for an account. Although at best, the plaintiffappears to have received only shs.65,000/- he had to payshs. 165,000/- directly in addition to payments under standing orderforce until June, 1984. In his view he had fully repaid the loan.According to the defendant, the sum which was to be advanced wasShs. 165,000/- at 12% per annum but to be disbursed in installments.It was to be drawn down within 3 months and repaid over 48 months.The first installment of Shs.65, 000/- was fully paid and acknowledgedwhile second sum of shs.50, 000/- was fully paid making a total ofshs.115, 000/-. In the third installment only shs.5,000/- was paidmaking a total of shs. 120,000/- leaving the balance of shs.45, 000/-which were debited towards agreed deductions. It was also statedthat the policy had lapsed for non-payment. By December, 1995,according to the defendant, the sum of shs.806,494/90 was due to itby the plaintiff. No evidence was adduced by the defendant that itwas a licenced money lender nor was there evidence that it wasentitled to charge more interest. In the plaintiffs view, it would be breach of the agreement if the rate of interest was increased over andabove the figure agreed.

Counsel for the parties made detailed submissions.Mr. Ibrahim, for the plaintiff, conceded that the first issues framedwere too wide as they sought the court's determination on whetherthe suit disclosed any or any reasonable cause of action. In his view,the suit disclosed the issue on as to whether the loan was advanced,paid and/or whether the interest had been properly applied so as toarrive at the amount due. To support this contention, he reliedheavily on the interlocutory ruling granting an injunction. In his view,the respondent, who has the custody of the accounts had failed toshow the amount advanced and how it was worked out until the dateof the intended sale of the plaintiffs suit premises. As a result, theamount due was till as ambiguous as at the time of the injunction.

On the other hand, Mr. Okwach submitted that the sum ofshs.165, 000/- was disbursed to or on behalf of the plaintiff which hadnot been fully repaid. According to him a total sum of shs. 165,000/-was paid on 4th May, 1979, 7th June, 1979 and 1st October, 1979 andthe deductions there from were authorized by the charge whichincluded the right to deduct there from the premiums for the life and fire policy and they lapsed when the plaintiff failed to makeremittances to the defendant of loan repayments. Consequently, theplaintiff had breached his agreement with the defendant and nowowed the defendant as in the counter claim.

The first issue for determination is in my view the terms of the loanagreement. On my reading of the charge, the loan secured wasshs.165, 000/- to be paid to the plaintiff from time and to enable him toconstruct a house. It was to be advances from time to time byinstallments as required with interest at the

rate of 12% on so muchof the aforesaid sum as shall have been advanced to the borrower (the plaintiff) with yearly rests.

Was any money advanced and if so how much? As can bediscerned from the evidence and exhibits, the mortgage was enteredinto on 23rd April, 1979 for construction of a building on the plaintiffsland known *as* LR No. 36/1/947 registered as I.R. No. 27604/1 underthe Registration of Titles Act. The advance was to be upto themaximum of shs.165, 000/- plus rates, rents, taxes in respect of thesuit premises if paid by defendant on behalf of 'the plaintiff.Purporting to be acting as above it is the plaintiffs case that after hepaid off another loan from the defendant in 1972, he requested for the current loan repayable aforesaid. He had received payment asfollows:

1. Certificate No. 1 of 9.5.79 for shs.65, 000/- deductedfor expenses.

2. Certificate No. 2 of 6.6.79 for shs.50, 000/- notreceived though recommended.

3. Certificate No.3 of 26th July, 1979 for shs.25, 000/- notreceived though recommended.

. When the sum of the third certificate was also not received by the plaintiff, he raised a complaint on 9th August, 1979 and cancelled policies on 12th June, 1990. The only admitted sum is therefore shs.65, 000/-. In repayment of the above, according to the plaintiff, he repaid as follows:

1990:

12-7-1990 -shs.100, 000/-by cheque

18-10-1990 -shs. 10,000/- cash

20-11-1990 -shs. 10,000/-cash

31-12-1990 -Shs. 10,000/-cash

1991:

23-1-1991 -shs. 10,000/- cash

11-1-1991 -shs. 10,000/- cash

19-2-1991 -shs. 10,000/- cash

Total - shs. 160,000/-

According to the plaintiff amount due should have therefore been as follows:-

A - Amount advanced - shs.65,000/-

B- Interest at 12% per annum for 1980 to 1990 - kshs.7,800/-

- Kshs.72, 800Amount overpaid shs.160, 000/- - kshs.72,800/- = Kshs.87,200/-On the other hand, the amount due as per the defendant consistedof shs. 165,000/- advanced as at the end of 1979. There ishowever no evidence of full payment of the said amount and atbest only part of the money was advanced after severaldeductions were made there from. The deductions could haveonly been justified if so provided in the mortgage agreement.There was also a life policy. According to the plaintiff it hadmatured and was entitled to payment. On the other hand it iscontended by the defendant that it had expired and had lapseddue to non-payment of premiums.

Counsel for the plaintiff canvassed the issue of general damages,in the event the court finds breach of the terms of the charge. Inarriving at a figure of shs.2, 000,000/- he submitted that as a result of the breach of the terms, the plaintiff had had to use overshs.250,000/- to complete the work The learned counsel for the defendant has however contended that no breach had been committed by the defendant and as such no damages were payable.

The prayers sought by the plaintiff in the plaint dated 20th February, 1991 were as follows:

(a) An injunction to restrain the defendant servants andor agents from selling or in any other way disposing ofthe plaintiffs property known as LR No 36/1/947 on the 21st day of February, 1991 or any other day pending further orders from this honourable court.

(b) An order for production by the defendant of all statements of accounts books and records concerning the aforesaid charge.

(bb1) A declaration that the plaintiff has met his obligations to the defendant company in respect to the charge over L.R. No. 36/1/947 Nairobi and thus this honourable court do and hereby order the defendant to release the title document in respect to ALL THAT property known as L.R. No.36/1/947 Nairobi to the Plaintiff.

(bb2) the defendant do remit to the plaintiff all benefitsaccrued on Life Endowment Assurance Policy No.49/4276, quantum whereof to be assessed by the court.

(bb3) General damages for breach of contract thereof tobe determined by the court.

(c) Costs of the suit"Prior to the hearing date, the issues which were agreed by theparties *or* approved by the court on 5th December, 1991 wereas follows:"1. Does the suit disclose a cause of action?

2. Was the charge executed subject to the provisions

Of the Registered Land Act or to Transfer of Property Act, 1882:

3. Did the policy lapse as alleged in the defence?

4. Was the defendant under any Statutory obligation tonotify the plaintiff of any default in payment before sellingthe charged property"

The amended plaint relied upon alleged inter alia that the plaintiff had executed a charge in favour of the defendant for shs.165, 000/- repayable by monthly installments of sh's.5,301/25 per month inclusive of insurance premiums as from 5th June, 1979 under the provisions of the Registered Land Act Cap. 300 of the Laws of Kenya

plaintiff commenced payments as from 1979 through bankers orders although the defendant had breached the terms of the charge of 23rd April, 1991 by making deductions there from and refusing to advance the agreed sum of shs. 165,000; was not notified of default before putting the property on sale; and that he held a life policy with the defendant worth 150,000/- with the defendant. Thedefendant however contended that the charge was under Transfer ofProperty Act, 1882 that there had been a default by the plaintiff thatnotice had been given before the attempted sale and that the plaintiffhad not paid the premiums and the policy had therefore lapsed.In law where one enters into a specific contract, the parties areexpected to perform the terms thereof to the letter unless the contractspecifically provides to the contrary or unless the parties dischargeeach other from the obligations there under. In HCCC No. 1301 of1995 Kenya National Capital Corporation Vs. Thammo HoldingLimited and 3 others, after considering a number of common lawauthorities, Bhahdari J. held that as the plaintiff breached a materialcondition in the agreement of guarantee of ensuring that all directorshad signed the documents or agreement of guarantee, thereby itdischarged those who had signed from liability under the specificagreements or

guarantee.

The court was also referred to the cases of Kenya Commercial BankLimited Vs. James Oisebe (1982-88) 1 KAR 48, Cuckmere Brick Co.Ltd and Another Vs. Mutual Finance Ltd. (1971) 1 All E.A. 633, ReidVs. National Commercial Bank (1971) E.A. 525 and Harilal and Co. Vs. Standard Bank Ltd. (1967) EA. 512 in which the courts held thata breach of a fundamental term of an agreement discharged theinnocent party from the effects of the agreement.When the current mortgage was made, the parties intended that thefunds advanced would all be applied to construction work. In therecital which shows the property as being held under the Registrationof Tiles Act and is actually L R. No. 36/1/947 not 1947, the sum ofshs. 165,000/- to be advanced was to enable the plaintiff to completethe construction of a building with interest at 12% on the amountadvanced and expenses with yearly rests in 48 monthly installments.The agreement or mortgage did not provide that the money to beadvanced could be used to discharge other plaintiffs' liabilities savethat the defendant could pay expenses on behalf of the plaintiff andclaim same from the plaintiff if any In breach of the clear intention ofthe mortgage, the defendant advanced only a portion of the agreedsum and proceeded to apply the balance to expenses of itsnominated architect and others including insurance premiums. Thiswas therefore a clear breach of the terms of the mortgage agreementand the court's answer to the first issue is that this suit discloses acause of action. As already stated, the property was held under the Registration of Titles Act to which Indian Transfer of Property Act, 1882 applies and the defendant was entitled to notice, which he was duly served with. This answers issue No.2 and 4 leaving the 3rd issue only.

Issue No. 3 relates to the Endowment Assurance Policy taken out by the plaintiff with the defendant. The plaintiff did not produce any evidence of payment of even a single premium. According to the defendant however only one premium was credited to the policy,presumably from the proceeds of the intended loan and that the samehad lapsed immediately. As policies must be paid for, there is noreason for me to find otherwise. I therefore hold that the policylapsed and the plaintiff is not entitled to payment in respect thereof.The parties did not have any issue relating to damages. Theamended plaint however sought damages for breach of contract. It is however observed that soon after the agreement was entered into, the terms were breached and in law he was thereby discharged therefrom. There is also no documentary evidence that he spent any money on the construction by reason of the breach of the agreement by the defendant. I am therefore unable to quantify the loss if any suffered by the plaintiff as a result of the defendant’s failure to makepayments as agreed in the mortgage

There is some evidence that some payments were made to thedefendant. There is however no specific pleadings for its return nor aprayer for same. As special damages must be pleaded and proved, Iam unable to make any award in that regard.As already stated, the defendant breached the terms of the mortgageby not making payment as agreed. The plaintiff was thereforedischarged from the terms of the mortgage. I therefore enterjudgement for the plaintiff against the defendant as prayed in prayers(a) (b) and (bb1) of the amended plaint. Prayers (bb2) and (bb3) arehereby dismissed. The interest in the statement of account to becalculated at 12% after allowing for payments. I dismiss the counterclaim made by the plaintiff. As the plaintiff has substantivelysucceeded in this suit, I award the costs of the suit to the plaintiff.Orders accordingly.

Dated and delivered this 1st day of July, 2003.

G.P. Mbito

JUDGE